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In The

Supreme Court of the United States

J. KENNETH STRINGER, III,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

JANET LEE HOFFMAN
Counsel of Record for Petitioner
HOFFMAN ANGELI LLP
1000 S.W. Broadway
Suite 1500
Portland, OR 97205
(503) 222-1125

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTIONS PRESENTED

Does *United States v. Kordel*, 397 U.S. 1 (1970), allow the government to hide a criminal prosecution behind a civil enforcement action, then lie to a targeted individual about his status and mislead him as to the true nature of the investigation to avoid the rules of criminal discovery and constitutional protections?

Where the government as part of its routine practice provides a targeted individual in the civil investigation with a generic form given to all witnesses that discloses the possible future sharing of his testimony with criminal authorities, does this form bar a Fifth Amendment challenge even where the government hides the true nature of the investigation through trickery, deceit or misrepresentation to avoid the rules of criminal discovery and constitutional protections?

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PETITION FOR WRIT OF CERTIORARI

J. Kenneth Stringer, III, respectfully petitions for a writ of certiorari to review the Ninth Circuit's judgment in this case.

OPINIONS BELOW

The amended opinion of the court of appeals (App. 1-29) is reported at 535 F.3d 929 (9th Cir. 2008). The opinion of the district court dismissing the indictment in this case (App. 30-51) is reported at 408 F. Supp. 2d 1083 (D. Or. 2006).

JURISDICTION

The Ninth Circuit entered judgment April 4, 2008. The court amended its opinion July 31, 2008 and denied rehearing and rehearing en banc at that time. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution provides in relevant part:

> No person * * * shall be compelled in any criminal case to be a witness against himself,

> nor be deprived of life, liberty, or property without due process of law * * * .

STATEMENT OF THE CASE

When the government pursues an individual for alleged misbehavior in simultaneous civil and criminal investigations, there is a tension between the government's power to compel testimony in the civil case and the individual's right not to testify in the criminal. When an individual is targeted in both civil and criminal investigations, the balance between the government's civil power and the defendant's Fifth Amendment right is established by this Court's decision in *United States v. Kordel*, 397 U.S. 1 (1970).

In this case, after eleven days of evidentiary hearings, the district court concluded that the government had overstepped the boundaries *Kordel* established because the United States Attorney's Office (USAO) "spent years hiding behind the civil investigation to obtain evidence, avoid criminal discovery rules, and avoid constitutional protections." (App. 42). As a result, the district court dismissed the indictments. The Ninth Circuit reinstated them on the basis of what is, in petitioner's view, a fundamental misreading of *Kordel*.

The district court's findings of fact are not in dispute. No party has challenged those findings and the Ninth Circuit accepts them. (App. 5).

A. Background

On June 8, 2000, the Securities and Exchange Commission (SEC) began an investigation of FLIR Systems, Inc., an Oregon Corporation that manufactures and sells infrared and heat-sensing cameras for commercial, military and law enforcement use. Two weeks later, the USAO joined that investigation and quickly determined that a few individuals should be targeted for criminal prosecution, including petitioner Stringer, FLIR's former CEO. (App. 7-8). The government also targeted former CFO, J. Mark Samper, and William Martin. *Id.*

The district court found the USAO "elected to gather information through the SEC instead of conducting its own investigation." (App. 38). In August 2000, an Assistant United States Attorney (AUSA) met with the SEC to discuss the particulars of the joint investigation. From this meeting forward, the two investigations were intertwined.

The SEC, USAO and FBI met again on October 3, 2000 to discuss further the "possible criminal charges within FBI jurisdiction." (ER1082).[1] The SEC provided the USAO with five notebooks of documents and a detailed memorandum setting out the legal and

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[1] As used in this brief, "ER__" refers to the Excerpts of Record the government (then-appellant) submitted to the Ninth Circuit. (Docket No. 13). "SER__" refers to the Supplemental Excerpts of Record submitted by defendants (then-respondents). (Docket No. 42).

factual allegations against the targets: Stringer, Samper and Martin. (App. 32). The SEC planned on informing defendants of their "target" status within the month. (ER1083). But plans quickly changed. Instead of conducting a parallel criminal investigation, the SEC and USAO "decided that the criminal investigation would abate in order to continue receiving statements from defendants and other witnesses through the civil investigation." (App. 32). As the government explained in a memo memorializing this meeting:

> It was determined that since Stringer has agreed to be interviewed by the SEC, the FBI will make no effort to interview Stringer or other corporate officers at this time so as **not to jeopardize** the opportunity to obtain statements from these individuals.

Id. (emphasis added). "Target" letters were never sent.

The USAO was committed to a criminal prosecution. (App. 32, 41). Ten days after this meeting, the AUSA requested more than a quarter of a million dollars in funding for a computer system for the FLIR investigation and trial expenses and stated that "absent a 'persuasive and complete explanation' the case 'warrants prosecution.'" (App. 32). The AUSA also stated that the USAO would "benefit greatly" from the SEC's investigation. *Id.*

The USAO was not simply a passive recipient of information gathered by the SEC. As the Ninth

Circuit acknowledged, the SEC tailored the investigation in ways that "facilitated the criminal investigation." (App. 9). The USAO was regularly discussing investigative strategy with the SEC and advising the SEC on the type of information needed for a criminal prosecution. (App. 34, 39). The USAO also instructed the SEC how to take testimony "to create the best record possible" in support of false statement cases. (App. 34).

The USAO in Portland even directed where the SEC would conduct investigative interviews by persuading the Los Angeles-based SEC staff attorneys to take testimony in Portland, Oregon so that the USAO in Portland would have venue to prosecute if defendants testified falsely. (App. 9, 34). For its part, the SEC instructed court reporters not to mention the DOJ's involvement to defendants' attorneys and asked that the prosecutor stay away from SEC interviews. (App. 35).

Almost a year into the joint investigation, in June 2001, the AUSA discussed the USAO's investigative needs with the SEC staff attorneys. They discussed resource issues and reaffirmed the strategic advantages of keeping the criminal investigation hidden. (ER1116-17). The AUSA told the SEC that this was "not [an] issue of [parallel] proceedings." (ER1116). The USAO did not want "to get in [the SEC's] way" because the government wanted to continue to gather evidence for the criminal prosecution. (ER1116). As the AUSA explained it, if the criminal authorities emerged in a separate parallel

proceeding, discovery ends: Once there is an indictment, "discovery is over. Criminal is totally 1 sided." (App. 38). The USAO gives everything to get nothing. *Id.* The SEC agreed that it was necessary to suppress the presence of the USAO believing that if the USAO surfaced, it would impede the government's ability to gather evidence from FLIR. (App. 35).

Stringer appeared pursuant to subpoena to testify in the SEC's civil investigation in October 2001—more than 12 months after the SEC and USAO had determined that he was a target. (App. 36). Just one month before Stringer testified, the AUSA wrote to the SEC staff attorney to give her specific direction about how to develop evidence needed for the criminal indictment: the AUSA sent the SEC a sample indictment, which illustrated the "specific acts of lying and concealment" that he believed offered incontrovertible evidence of intent. (SER781).

Enclosed with the subpoena was the standard SEC Form 1662, a lengthy disclosure form sent to every witness asked to supply information to the SEC voluntarily or under subpoena, whether or not he is the focus of the investigation. (App. 40). This boilerplate form consists of four single-spaced pages of "supplemental information" in fine print. Buried in the middle of the third page, under the heading, *Routine Uses of Information*, the form gives notice that the SEC often makes its files available to other

agencies including the USAO.[2] The district court concluded that this pro forma disclosure did not fairly alert defendants to the possibility of criminal exposure. *Id.* A standard cover letter that also accompanied the SEC subpoenas told defendants: "The investigation and the subpoena do not mean that we have concluded that you or anyone else has broken the law." (ER1125; ER1140; ER1151).

Before the questioning began, Stringer's attorney asked the government directly about Stringer's status and the nature of the investigation, the SEC attorney adhered to the joint strategy to keep the USAO's involvement secret; in so doing, she misled Stringer and his counsel through misrepresentation and omission. (App. 41). Specifically, his attorney asked whether Stringer was a target since that would determine whether he would waive his right not to be a witness against himself. (App. 37-38).

- *Stringer's Attorney*: "My first question is whether Mr. Stringer is a target of any aspect of the investigation being conducted by the SEC."
- *SEC Attorney*: "The SEC does not have targets in this investigation."

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[2] For the Court's reference, a copy of the 1662 Form is available on the SEC's website. SECURITIES AND EXCHANGE COMMISSION, SEC 1662 (5-04), http://www.sec.gov/about/forms/sec1662.pdf.

(App. 37). This was a lie. The district court found that Stringer was a target from the beginning (App. 38, 40), as proved by the government's own documents that predate the SEC's questioning of Stringer:

- *FBI Memo* (07/05/01): "The SEC identified that the individuals that they were targeting in their investigation are Ken Stringer . . . " (ER1132).
- *SEC E-mail* (04/05/01): "With regard to targets—[AUSA] . . . currently defines targets as Ken Stringer and Mark Samper." (ER1105).

Throughout the course of the civil investigation, Stringer and his attorney believed that the focus of the civil investigation was sclely for purposes of regulatory enforcement. (ER1240). Although Stringer believed the investigation was purely civil in nature, in an abundance of caution, his attorney asked whether the SEC was "working in conjunction with *any other department* of the United States, such as the U.S. Attorney's Office in any jurisdiction, or the Department of Justice." (App. 37) (emphasis added). The staff attorney did not answer the question, stating that agency policy prevented her from responding and directed him to make his own inquiries with the agencies he mentioned. *Id.* As the district court found, the SEC "misled Stringer and his attorney into believing he was not a target and evaded the question about the USAO's involvement." (App. 42). Had the government been forthcoming with Stringer, he would not have given a statement. (App. 37-38).

By September 2002, the USAO had developed through the nominally civil investigation all the evidence it thought it needed to indict defendants and obtain a conviction. (SER888-89). After receiving the second of two SEC charging recommendation letters, the AUSA told the SEC in a conference call that he was "quite confident" he could put the defendants "in jail." (SER888). He added that because the SEC had "done all the work, [he] does not have to." *Id.* The following month, he told the SEC that he was ready to "transform [the SEC's work] into a criminal context." (ER1224). "The USAO confirmed its commitment to a criminal case, but emphasized to the SEC that it would 'need to be spoonfed' the evidence from the civil investigation." (App. 41).

In December 2002, after defendants had testified extensively in an ostensibly civil investigation, the SEC and AUSA "discussed the strategy for the case and decided that the USAO would 'surface end of Jan/early Feb [2003]' and with 'no notice.'" (App. 35). Nine months later, in September 2003, the USAO charged defendants Stringer, Martin and Samper in a 50-count indictment alleging federal securities fraud.

B. Proceedings Below

When defendants first raised the issue of improper coordination between the SEC and USAO in connection with a discovery motion, the district court accepted the AUSA's in-court representation that the

USAO "did not participate in or in any way influence the civil investigation." (SER17). The AUSA later reiterated the claim, telling the district court, "[t]here is not a shred of evidence here, your Honor, that suggests that the SEC ever participated with the government." (SER36).

Trusting the government's representations, the district court denied defendants' discovery request, writing in his opinion, "the SEC [was] not participating in this federal prosecution . . . it cannot rightfully be said that the SEC is working on the government's behalf in this case. . . . " (SER07-08).

Many months later, after the court held extensive evidentiary hearings on defendants' motions to dismiss the indictment, the truth came out. The government had produced numerous internal documents detailing the many meetings and communications between the two agencies that told the real story. In a striking reversal of his earlier finding, the district court found that

> the USAO was actively involved in the SEC investigation: meeting regularly, receiving documents, requesting interviews be conducted in Oregon . . . advising what information was needed for a successful criminal prosecution . . . and repeatedly planning with the SEC as to when it would be best to surface and conduct an overt criminal investigation.

(App. 39). Further, the district court firmly rejected the government's testimony, writing: "it cannot *credibly* be claimed that these were parallel proceedings." (App. 43) (emphasis added).

Elaborating further, the district court wrote, "the USAO intentionally shielded its intentions behind the guise of a civil prosecution, resorting to subterfuge to maintain the secrecy of its involvement." (App. 40). It added, "[h]ere the government engaged in *deceit and trickery* to keep the criminal investigation concealed." (App. 42) (emphasis added).

Despite these findings of trickery, deceit and subterfuge—factual findings that the Ninth Circuit adopted on appeal (App. 5)—the Ninth Circuit reversed, concluding that the investigation was merely an acceptable covert criminal investigation because (i) the SEC initiated the civil investigation first (albeit just two weeks before the USAO's involvement), (ii) the SEC had a legitimate civil objective in addition to the criminal objective it pursued (App. 22), and (iii) because Form 1662 disclosed the possibility that "information received in the course of the civil investigation could be used for criminal proceedings." (App. 5-6).

Petitioner filed a Petition for Rehearing and Suggestion for Rehearing En Banc on May 19, 2008, which the Ninth Circuit denied in its Amended and Superseding Opinion dated July 31, 2008. (App. 4).

REASONS FOR GRANTING THE PETITION

Review by this Court is necessary because the Ninth Circuit has decided an important question of federal law that conflicts with this Court's decision in *United States v. Kordel*, 397 U.S. 1 (1970). The Ninth Circuit decision, if allowed to stand, has sweeping implications for the conduct of parallel proceedings nationwide because it permits the government to use the civil process to gather evidence for a clandestine criminal prosecution in violation of the due process protections laid down in *Kordel*. The government cannot use a civil proceeding to trick a defendant into waiving Fifth Amendment protections by deceiving him about the true nature of a civil investigation to obtain evidence for his criminal prosecution. *Kordel*, 397 U.S. at 11. In *Kordel*, this Court warned that the government violates due process where it uses the civil investigation to gather evidence for a criminal case and fails to advise a defendant in its civil proceeding that it contemplates his criminal prosecution or where there are other "special circumstances" suggesting the unconstitutionality or impropriety of the criminal prosecution. *Id.* at 11-12. According to the district court's findings, that is precisely what happened here.

The Ninth Circuit has endorsed the government's behavior. In doing so, it redefined and vastly expanded the scope of acceptable parallel proceedings in a way that conflicts with *Kordel*. If the Ninth Circuit decision stands, civil and criminal agencies can now join together to undertake a single, coordinated

investigation and, through stealth and subterfuge, leverage the civil investigation to gather testimony and evidence unobtainable in an open criminal investigation. As long as the civil investigation has a bona fide objective and commenced before the criminal—if only by two weeks—there can be no violation of due process even where the criminal prosecutors are actively involved in the civil investigation: meeting regularly, discussing strategy, proposing interview locations to establish venue, and instructing on how best to conduct interviews to develop evidence for a criminal prosecution.

The Ninth Circuit departs even further from *Kordel* because it allows the government to (i) conduct a criminal investigation under the guise of a civil investigation, and (ii) affirmatively misrepresent the nature of the investigation as long as it provides a boilerplate form stating that an individual has a Fifth Amendment right and that the SEC often makes its files available to other governmental agencies. In other words, this perfunctory disclosure cures all deception; it even cures an affirmative misrepresentation. Here Stringer asked directly (i) whether he was a target of the investigation, and (ii) whether the SEC was working with the USAO. The district court found that the staff attorney lied in response to the first question and misled Stringer by failing to answer the second. (App. 42). To encourage such intentionally misleading behavior by prosecutors and government agents permits an end-run around the constitutional rights that this Court's balance in *Kordel* was intended

to protect. Review by this Court is necessary to ensure the Ninth Circuit's compliance with the core principles of *Kordel*.

Review is also necessary to resolve a circuit court conflict. The Ninth Circuit decision stands for the proposition that *only* an affirmative misrepresentation that leads a defendant into believing the investigation is exclusively civil in nature and will not lead to criminal charges constitutes fraud in violation of due process. Its decision conflicts with the well-established principle that silence amounts to fraud where "there is a legal or moral duty to speak or where an inquiry left unanswered would be intentionally misleading." *United States v. Prudden*, 424 F.2d 1021, 1032 (5th Cir. 1970). Here, the government's failure to answer Stringer's direct inquiry about the nature of the investigation was intentionally misleading and permitted the government to obtain evidence in a civil investigation for use in a criminal prosecution. The Ninth Circuit decision cannot be reconciled with this Court's precedent in *Kordel* or with the long-standing rule the Fifth Circuit announced in *Prudden* and the Seventh Circuit recognized in *United States v. Peters*, 153 F.3d 445 (7th Cir. 1998).

I. The Ninth Circuit Has Decided an Important Federal Question that Conflicts with *United States v. Kordel* Because Its Decision Permits the Government to Conduct a Criminal Investigation under the Guise of a Nominally Civil Investigation.

This Court has long denounced the practice of using civil enforcement powers to circumvent constitutional rights. *Abel v. United States*, 362 U.S. 217 (1960). It has admonished that the government's deliberate use of the administrative process "for the purpose of gathering evidence in a criminal case must meet stern resistance by the courts." *Id.* at 226. The district court here demonstrated that resistance when it dismissed the indictment.

Where the government pursues an individual simultaneously in a civil and criminal investigation, the individual is faced with a difficult choice: if he declines to testify in the civil case by asserting his Fifth Amendment privilege, the consequences may be severe. His ability to defend himself is substantially impaired. His silence can be used against him and he may face a default judgment or worse. The foreseeable result is financial ruin through penalties and forfeiture. Alternatively, if he decides to testify in the civil case, that evidence may be used against him. The risks associated with waiving the privilege are difficult to assess, but the target might erroneously conclude, if he is unaware of the criminal investigation, that through cooperation he is minimizing the risk of a criminal referral.

Though it is a Hobson's choice, this Court recognizes that there is nothing unfair about making an individual choose which route to take; parallel proceedings by definition require an individual to litigate in two forums simultaneously. But it is unfair in the extreme to deprive an individual of information that tells him that he has this all-important choice. When the government misleads an individual about the true nature and circumstances of the investigation, he cannot decide whether it is in his best interest to waive his Fifth Amendment right or assert it. Where, as here, the government deliberately misleads an individual about the true nature of the investigation (through both affirmative and silent misrepresentation), and then uses the coercive power of civil process to induce a waiver of constitutional rights, the government gains a tactical advantage by obtaining evidence that is otherwise off limits.

A. *Kordel* affirms that the deliberate use of the civil process to circumvent Fifth Amendment rights to obtain evidence for a criminal prosecution violates due process.

It is a well-settled rule that the government may conduct simultaneous civil and criminal proceedings without violating the due process clause or departing from proper standards in the administration of justice. *United States v. Kordel*, 397 U.S. 1, 11-12 (1970). But the government may not use the civil proceeding

to circumvent Fifth Amendment protections or otherwise act in bad faith.

In *Kordel*, this Court recognized the boundary between proper and improper uses of parallel proceedings. The government crosses the line and violates a defendant's rights where:

> the [g]overnment has brought a civil action solely to obtain evidence for its criminal prosecution or has failed to advise the defendant in its civil proceeding that it contemplates his criminal prosecution . . . [or] any other special circumstances . . . might suggest the unconstitutionality or even the impropriety of this criminal prosecution.

Id. (App. 16; App. 67).

In *Kordel*, the FDA, in the course of an investigation into possible violations of the Food, Drug and Cosmetic Act by a corporation and its officers, initiated a civil investigation and lawsuit seeking to seize some of the corporation's products. *Kordel*, 397 U.S. at 3. In connection with the suit, the FDA also filed extensive interrogatories. Before Kordel responded, the FDA notified the company that the agency was contemplating a criminal proceeding against the company concerning the same allegations. *Id.* at 4. Defendants moved to stay the civil proceedings or extend the time to answer the interrogatories until any criminal proceeding was concluded. The court denied the motion. The FDA thereafter formally

recommended criminal proceedings to the General Counsel. After the company answered the interrogatories, the DOJ followed a recommendation by the Department of Health, Education and Welfare to institute a criminal proceeding. The government later obtained criminal misbranding convictions against two corporate officers. *Id.* at 6.

On a grant of certiorari to consider the government's questions concerning the invocation of simultaneous civil and criminal proceedings, the officers of Kordel argued that the government had used the civil discovery process to compel answers to interrogatories to build the DOJ's parallel criminal case and that such use "reflected such unfairness and want of consideration for justice as . . . to require reversal." *Id.* at 11. This Court noted that the officer had answered the interrogatories after being told of a contemplated criminal action against him. *Id.* at 7. This Court thus found no violation of due process, explaining that it would "stultify enforcement of federal law to require a governmental agency . . . to choose either to forgo recommendation of a criminal prosecution once it seeks civil relief, or to defer civil proceedings pending the ultimate outcome of a criminal trial." *Id.*

At the same time, this Court recognized specific examples of bad faith conduct in parallel investigations that evidence a due process violation for "fail[ing] to advise the defendant in its civil proceeding that it *contemplates* his criminal prosecution." *Kordel*, 397 U.S. at 12 (emphasis added). This Court cited two instructive examples in which the government

misused civil investigations for criminal purposes. *Id.* at n.24.

First, the Court referenced *United States v. Lipshitz*, 132 F. Supp. 519 (E.D.N.Y. 1955), in which two separate civil and criminal IRS investigations improperly merged when the civil agent met with the special (criminal) agent at least five times and the criminal agent instructed the civil agent about obtaining evidence. The court found that the two "were jointly engaged in the preparation of the case for the criminal prosecution of the defendant, and that they did not inform him. . . ." *Id.* at 523. The district court suppressed the evidence, concluding that to obtain information for a criminal prosecution without the defendant's knowledge is the equivalent of obtaining the information by "stealth or subterfuge." *Id.*

Second, this Court cited *United States v. Guerrina*, 112 F. Supp. 126 (E.D. Pa. 1953), in which the defendant believed that the agent was examining his books and papers to establish his civil liability when in fact the agent was participating "to obtain evidence for [a] *contemplated* criminal prosecution." *Id.* at 130 (emphasis added). The district court thus held:

> the defendant's constitutional rights were violated in that he was induced under a misapprehension of the true facts and circumstances to give his consent to an examination .... His rights were further violated in that he was induced by reason of the same

> misunderstanding of the true facts and circumstances to give testimony against himself without proper warning.

Id. at 130-31. The district court concluded that the "subterfuge employed by the agents negatived his consent and rendered his action involuntary." *Id.* at 131. The court reasoned further that such conduct, if tolerated, would encourage the government to employ stratagems to trick defendants into waiving their rights:

> To permit evidence to be obtained against a defendant by the means here employed (however innocently it may have been done in this case) would be to encourage overzealous and less scrupulous officers and agents of law enforcement agencies to chip away rights guaranteed by the Constitution to defendants by trick and artifice, to do what could not be done in court proceedings, i.e., compel a defendant to testify against himself.

Id. at 130.

This Court spoke loudly when it cited *Lipshitz* and *Guerrina* with approval in *Kordel*. Those cases demonstrate that the government runs afoul of due process protections by failing to advise the defendant that it contemplates his criminal prosecution so that it can use the civil process to gather evidence prohibited by the limits of criminal discovery and the Fifth Amendment. This case falls squarely within the bad faith scenarios contemplated by *Kordel* and differs from *Lipshitz* and *Guerrina* only in that the conduct

here was *more* egregious. Here, Stringer asked the SEC directly whether he was a target and whether criminal authorities were involved. The government responded with prevarications.

B. The Ninth Circuit conflicts with *Kordel* because its decision endorses the use of the civil investigative process to circumvent constitutional rights.

The Ninth Circuit improperly sanctioned the government's behavior in this case and in so doing, gutted *Kordel* of practical significance by allowing the use of the government's civil enforcement powers to circumvent the Fifth Amendment. In this case, had Stringer known that the USAO sought his testimony, he would have invoked his Fifth Amendment rights. (App. 37-38, 42-43). While the USAO could not hide its involvement and still compel Stringer to testify, it could avoid constitutional protections by acting, as it did, through the SEC's civil enforcement power:

> YOU MUST TESTIFY . . . FEDERAL LAW REQUIRES YOU TO COMPLY WITH THIS SUBPOENA. Failure to comply may subject you to a fine and/or imprisonment.

(ER1133). Without notice to defendants, the AUSA explained to the SEC how to interrogate defendants with an aim toward making a criminal case. (App. 39, ER1105). Stringer complied with the subpoena, the staff attorney prevaricated: her response was "evasive and misleading, particularly in light of the close

association between the USAO and the SEC throughout the investigation and the early identification of Stringer as a criminal target." (App. 41).

Notably, the SEC's misleading answers simply reaffirmed the information contained in the standard cover letter that accompanied the subpoenas. The letter made two important but misleading points adding to the fraud. First, it told the witness that the SEC had made no determination that wrongdoing had occurred. Second, it told the witness that he had not been singled out as a subject or target. In this case, both assertions were false. Specifically, the cover letter contained the following "Important Information" for the witness:

> *Has the Commission determined that anyone has done anything wrong?*
>
> This investigation is a non-public, fact-finding inquiry. We are trying to determine whether there have been any violations of the federal securities laws. The investigation and the subpoena do not mean that we have concluded that you or anyone else has broken the law. Also the investigation does not mean that we have a negative opinion of any person, entity or security.

(ER1125; ER1140; ER1151). Taken together, Stringer had no reason to know that the government was targeting him for criminal prosecution and had every reason to believe the investigation was purely civil in nature.

Of course, the SEC was not just *targeting* Stringer, it was working hand in hand with the USAO to set him up for the criminal indictment. (App. 38). All the while the USAO was "actively involved," meeting regularly with the SEC, receiving documents, requesting interviews in Oregon, and advising on the information needed for a successful criminal prosecution. (App. 39). The government knew that if the truth was revealed, discovery would end. (App. 38).

The SEC ultimately questioned Stringer for a total of nine days. The SEC attorneys embraced the criminal investigator role as their own documents show:

- "It will be interesting to see if Samper's previous testimony buys him a go to jail card." (SER741).
- "If [SEC has] done all the work then maybe [AUSA] won't need so much G[rand] J[ury] test[imony]." (ER1119).
- "Prior testimony can be used to impeach. * * * [SEC] nailed him [Stringer] to 4 or 5 things pretty incontrovertibly." (SER908).

In fact, the AUSA later exulted that the SEC had "done all the work" for him. (SER889). The SEC was the stalking horse for the criminal investigation, gathering defendants' testimony for use as substantive evidence and for false statement charges. This bad faith conduct gave the government a tactical advantage. The district court wrote:

> The government was concerned that the presence of a criminal investigation would halt the successful discovery by the SEC, witnesses would be less cooperative and more likely to invoke their constitutional rights, and that the rules of criminal discovery would be invoked.

(App. 38).

An abundance of direct evidence supported the district court's finding that the USAO intentionally "resort[ed] to subterfuge to maintain the secrecy of its involvement" (App. 40), for the express purpose of "receiving statements from defendants and other witnesses through civil investigation." (App. 32). "The government's tactic to move forward under the guise of a civil investigation, violated defendants' due process rights." (App. 41). Yet remarkably, the Ninth Circuit came to the opposite legal conclusion relying on only two facts: (1) the SEC opened its investigation two weeks before it made a criminal referral, and (2) the SEC provided a standard form advising defendants that information could be used against them and might be shared with criminal authorities. No court since *Kordel* was decided has taken such a limited view of bad faith conduct.

Legitimate parallel proceedings may be improper (i) where they create "substantial prejudice to the rights of the parties involved" or (ii) "where there is specific evidence of agency bad faith or malicious governmental tactics." *Sec. and Exch. Comm'n v. Dresser Indus., Inc.*, 628 F.2d 1368, 1374, 1375 (D.C. Cir. 1980)

(en banc). Put simply, courts uphold the use of parallel proceedings unless the government attempts to manipulate the proceedings to gain an unfair and improper advantage, as happened here.[3]

To get around the issue of bad faith, the Ninth Circuit invokes the statement in *Kordel* that the government may not bring a civil action "solely to obtain evidence for its criminal prosecution." *Kordel*, 397 U.S. at 11-12. Since the SEC investigation was not undertaken *solely* for that purpose, the Ninth Circuit concludes it must be acceptable no matter what occurred in the investigation later. This is a drastic reinterpretation of parallel proceedings doctrine.

The Ninth Circuit focuses on this "solely" factor and pays no attention to the prosecutors' active influence in the civil investigation. For example, the prosecutors promised the SEC that it would never have to try the case: the USAO would simply convert the SEC's work into a criminal indictment and then

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[3] In *United States v. Grunewald*, 987 F.2d 531, 534 (8th Cir. 1993), the Eighth Circuit recognized the imperative behind demarcating the transfer or referral of a matter to the criminal investigative agency. Without such demarcation, an abuse of the civil process to gather evidence for criminal investigations "would be a flagrant disregard of individual rights." *Id.* Hence, the court warned against government conduct that deliberately deceives or lulls a person into providing evidence in a civil investigation when activities of a criminal nature are under investigation. *Id.*

move to stay the SEC case. (ER1117). That is precisely what happened. By sidestepping the issue of bad faith, the Ninth Circuit hollows out the core principle of *Kordel*.

Finally, the Fifth and Ninth Circuits' recent conflicting interpretations of the constitutional significance of the facts in *United States v. Posada Carriles*, 486 F. Supp. 2d 599 (W.D. Tex. 2007), pointedly illustrate the present confusion about the permissible degree of interagency coordination in parallel proceedings. Two circuit courts looked at the same facts and came to opposite legal conclusions. The Ninth Circuit saw the *Posada Carriles* case as a "clear example of bad faith." (App. 21).[4] The Fifth Circuit saw none. *United States v. Posada Carriles*, 541 F.3d 344 (5th Cir. 2008) (reversing district court and finding nothing improper about extensive criminal involvement in civil administrative proceeding). Thus, while both circuits suggest faithful adherence to *Kordel*, the Fifth Circuit reversed a dismissal order that the Ninth Circuit presumably would have affirmed.

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[4] The Ninth Circuit agreed with the district court's dismissal of an indictment concluding that the government engaged in bad faith where the government used a U.S. Citizenship and Immigration Services interview to collect evidence for a criminal case. "The interview protocol was altered in so many ways to serve the needs of the criminal investigation that it became an interrogation." (App. 21).

C. The Ninth Circuit decision hollows out the *Kordel* rule and allows the government to misrepresent the true nature of its investigation.

Kordel directs that the failure to advise the defendant in the civil proceeding that the government specifically contemplates *his* criminal prosecution is bad faith. The Ninth Circuit, however, disregards as inconsequential and merely "collateral" facts that were central to the district court's finding that the government "engaged in deceit, trickery or intentional misrepresentation" to conceal the true nature of the investigation. (*See* App. 42) (citing to *United States v. Tweel*, 550 F.2d 297, 300 (5th Cir. 1977)). The Ninth Circuit skirted these facts holding that there was no bad faith deception because Form 1662 "warned defendants that the civil investigation could lead to criminal charges against them." (App. 25).

Even if Form 1662's conditional language could be interpreted to "inform" petitioner of anything, the Ninth Circuit's decision is at odds with this Court's precedent because *Kordel* implicitly recognizes that government trickery or deception in the context of an ostensibly civil investigation will negate an otherwise valid waiver of the right against self-incrimination. *Kordel* cites with approval to *United States v. Thayer*, 214 F. Supp. 929 (D. Colo. 1963), at footnote 23. In *Thayer*, as here, the SEC did not tell the defendant that the government was actively investigating him for criminal wrongdoing when he provided information in

an ostensibly civil investigation. The court in *Thayer* concluded that warnings are ineffective when the defendant is unaware that the investigators are focusing on *his* conduct. It reasoned, "the giving of the warning can not have much significance where the defendant was, so to speak, then within the sights of Government and did not receive an explanation of the true import of the . . . inquiry." *Thayer*, 211 F. Supp. at 933. Thus, in the context of parallel investigations, government bad faith through deliberate subterfuge to circumvent constitutional rights excuses the defendant from invoking his right against self-incrimination.

To like effect is *United States v. Guerrina*, 112 F. Supp. 126 (E.D. Pa. 1953), discussed above, wherein the district court concluded that the "subterfuge employed by the agents negatived his consent and rendered his action involuntary." *Id.* at 131.

In any event, a perfunctory, boilerplate form is not a cure-all for the government's subterfuge, deception and misrepresentation. Form 1662 cannot (and did not) negate the government's deception because this four-page, single-spaced disclosure affirmatively misled defendants. It did not provide fair notice because it speaks only to the *possibility* that sometime in the future the witness's testimony "*may* be used against" him. (App. 10) (emphasis added). There is nothing in the disclosure telling the defendants that their testimony *was in fact being developed* for their direct criminal prosecution, as happened here. The false statement in the accompanying cover letter,

which told defendants that the SEC had not concluded that anyone had broken the law, only compounded the government's deception. This was not a case where criminal prosecution was a hypothetical possibility. Moreover, when an individual follows up with a direct question about the nature of the investigation, the government cannot simply point back to the generalities of the Form 1662 to justify its deception in response to a specific inquiry.

The standard disclosure is patently misleading because it does not speak to the true circumstances. Telling an individual in a boilerplate form that he has a Fifth Amendment right and that information received is often shared with other agencies is no substitute for the truth. Furthermore, when the form is provided to every witness the SEC interviews—most of whom have no criminal exposure—and when all are told that information they give may be used against them or is often shared, this routine warning is not equivalent to advising the defendant that the government contemplates his criminal prosecution. A generic warning of this sort does not meet the standard this Court laid down in *Kordel*, especially when the opposite is true: the civil and criminal authorities are already working closely to develop evidence for the defendant's criminal prosecution.

Both Stringer and his attorney understood the implications of providing testimony to the SEC. For this reason, his attorney specifically asked before the interview began: (1) whether Stringer was a target of the investigation, and (2) whether the SEC was

working with the USAO. The SEC staff attorney understood the importance and significance of the inquiry but did not respond truthfully. Instead, she exploited the situation through her affirmative and silent misrepresentations, which were designed to prevent Stringer from discovering the true dual nature of the government's investigation and asserting his constitutional rights.

When the SEC attorney failed to answer his direct question about any USAO involvement, the government compounded its deceit. (*See* discussion at Section II, *infra*). None of this mattered to the Ninth Circuit. In effect, the circuit court decision stands for the proposition that so long as the government has provided a boilerplate disclosure, it can mislead and dissemble with half-truths. In civil cases, the label for this is "fraud." *Equitable Life Ins. Co. of Iowa v. Halsey Stuart & Co.*, 312 U.S. 410, 425 (1941).

The Ninth's Circuit's reliance on *Minnesota v. Murphy*, 465 U.S. 420 (1984), to support its holding that defendants waived their privilege against self-incrimination by failing to invoke it is misplaced. *Murphy* and its progeny can be distinguished from this case. *Murphy* involved statements that the defendant gave to his probation officer (a criminal law enforcement official) concerning specific questions of criminal activity. Thus, in the *Murphy* line of cases, the defendant is well aware of the existence of a possible criminal investigation and knows the true nature of the proceeding. In fact, this Court in *Murphy* discusses *Kordel* to make the point. The Court

explains that because the defendant in *Kordel* knew of a "contemplated criminal action against him" when he answered the interrogatories, he could not complain that he was compelled to give testimony. *Id.* at 428. The relationship between "the civil and criminal actions was clear and '[w]ithout question [the officer] could have invoked his Fifth Amendment privilege.'" *Id.* (quoting *Kordel*, 397 U.S. at 7). That is the all-important factual difference that sets petitioner's case apart from the results in *Murphy* and *Kordel.*

Here the government actively worked to conceal from defendants the existence of any relationship between the two agencies. And at no time did the government tell Stringer that it contemplated a criminal action against him. The SEC and USAO intentionally deprived him of meaningful information that was central to his decision to testify – namely, that the civil attorneys were doing the bidding of the criminal prosecutors. Additionally, in *Murphy*, unlike this case, there was no evidence of bad faith or abuse of process; it is the bad faith deceit used to lull a defendant into providing evidence in a civil investigation that excuses the defendant from invoking his right against self-incrimination.

II. The Ninth Circuit Decision Conflicts with Decisions of Other Circuits that Hold that Silence Can Be Equated with Fraud Where an Inquiry Left Unanswered Would be Intentionally Misleading.

The Ninth Circuit essentially holds that only an affirmative misrepresentation will violate due process. (App. 22-25). Its decision conflicts with the settled principle that silence can be equated with fraud where "there is a legal or moral duty to speak or where an inquiry left unanswered would be intentionally misleading." *United States v. Prudden*, 424 F.2d 1021, 1032 (5th Cir. 1970). *Accord United States v. Peters*, 153 F.3d 445 (7th Cir. 1998). Fraudulent concealment can be as much a deceit as a direct lie. As this Court once described it, "a statement of a half truth is as much a misrepresentation as if the facts stated were untrue." *Equitable Life Ins. Co. of Iowa*, 312 U.S. at 425.

The Fifth Circuit, in *United States v. Tweel*, 550 F.2d 297 (5th Cir. 1977), held that a government prosecution based on "deliberate deception" perpetrated through a "silent misrepresentation" may not be the predicate for a criminal prosecution. In *Tweel*, an IRS agent known by the defendant to have the power to conduct civil audits asked the defendant's accountant to produce defendant's records for an audit. Before producing the records, the accountant asked the IRS agent whether a "special agent" (for criminal matters) was involved in the investigation. *Id.* at 299. Although there was a related criminal

investigation underway, the IRS agent replied that no such agent was involved. The *Tweel* court found the response to constitute "a sneaky deliberate deception." *Id.* The Fifth Circuit reasoned:

> [The IRS agent] obviously knew the accountant inquired whether a special agent was involved to determine whether he was conducting a criminal audit. [The agent's] response, although on the face of it true, misled appellant to such a degree that his consent to the "search" must be vitiated by the agent's silence concerning the origin of this investigation.

Id. The court found this deception constituted a "flagrant disregard for appellant's rights." *Id.* at 299. It refused to "condone this shocking conduct." *Id.* at 300. The agent's failure to apprise the defendant of the criminal nature of the investigation was a "silent misrepresentation [that] was both intentionally misleading and material." The court reversed the defendant's conviction.

The Seventh Circuit, in *Peters*, 153 F.3d at 445, adheres to the same principle. While the government need not volunteer to defendant that he is the subject of the investigation or that it is criminal in nature, when asked, it cannot misrepresent through silence or dissembling. A failure to respond by deflecting the question when intended to mislead is as deceptive as an outright lie. *Id.*

Based on the facts in this record—facts affirmed on appeal—the district court concluded that the government's evasive answer misled petitioner Stringer. (App. 42). Yet the circuit court found there was no misrepresentation resulting from the SEC's non-responsive answer to a direct inquiry. Thus, the Ninth Circuit decision stands for the proposition that only an affirmative misrepresentation to a direct inquiry is fraud.

Stringer had every reason to trust that his government would tell him the truth. As the Fifth Circuit poignantly stated, a democracy such as ours cannot tolerate an abuse of trust between the government and its people. *Sec. and Exch. Comm. v. ESM Gov't Sec., Inc.*, 645 F.2d 310, 316 (5th Cir. 1981). Private persons have a right to expect candor from the government:

> We believe that a private person has the right to expect that the government, when acting in its own name, will behave honorably. When a government agent presents himself to a private individual and seeks that individual's cooperation based on his status as a government agent, the individual should be able to rely on the agent's representations. We think it clearly improper for a government agent to gain access to records which would otherwise be unavailable to him by invoking the private individual's trust in his government, only to betray that trust.

Id. at 316 (denying enforcement of SEC subpoena for deceptive government conduct and applying *United States v. Tweel*, 550 F.2d 297 (5th Cir. 1977)).

III. This Case Presents an Issue of Exceptional Practical Importance.

In recent years, there has been a steady increase in the number of SEC investigations and administrative proceedings. As the nation copes with the effects of the worsening global financial crisis, including the subprime mortgage debacle, the SEC and the Department of Justice have faced rising public and political pressure to uncover potential wrongdoing and hone in on possible targets. In this politically charged climate, this case presents an exceptionally timely and important issue requiring review.

In 2000, the SEC opened 558 investigations.[5] Six years later, this number had almost doubled to 914 investigations opened.[6] Amid the public's anxiety, federal prosecutors, the FBI, and civil regulators, such as the SEC, have launched sweeping investigations into mortgage and credit-related fraud. For example, in February 2008, FBI officials noted that "they are conducting criminal investigations of 16

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[5] 2000 SEC Ann. Rep. 143.

[6] 2006 SEC Ann. Rep. 25.

companies, while their partners at the SEC are investigating nearly two dozen more."[7]

The political and public pressure for swift and comprehensive action against banks, lenders, and other financial institutions comes at a time when the ranks of the FBI's white-collar investigators have been depleted: "FBI data shows that the cutbacks have been particularly severe in staffing for investigations into white-collar crimes like mortgage fraud, with a loss of 625 agents, or 36 percent of its 2001 levels."[8]

The Department of Justice by necessity must rely on the civil regulatory agencies to do the leg work for the criminal authorities. This cooperative arrangement is in fact encouraged. "FBI agents are working hand-in-hand with the SEC, which has enlisted 100 lawyers as part of its nationwide subprime working group and which has made criminal referrals to other government agencies."[9] The top federal prosecutor in Los Angeles recently confirmed that his office is currently engaged in a sweeping investigation into banks and subprime lenders and his prosecutors are working closely with the SEC and other federal

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[7] Carrie Johnson, *A Labyrinthine Path to Justice,* WASH. POST, Feb. 14, 2008, at D01.

[8] Eric Lichtblau, David Johnston and Ron Nixon, *FBI Struggles to Handle Financial Fraud Cases*, N.Y. TIMES, Oct. 19, 2008, at A1.

[9] Johnson, *supra*, note 7.

agencies.[10] Similarly, in a current case involving the federal seizure of Washington Mutual, one of the nation's largest banks, the Seattle USAO acknowledged that it is leading a team of investigators from six government agencies to examine what caused regulators to close the bank. Officials from the FBI, the SEC, the Federal Deposit Insurance Corporation and the IRS are all part of the effort.[11]

Without a doubt interagency cooperation is encouraged; joint investigations promote efficiency and can maximize limited resources. But interagency cooperation need not and must not come at the expense of the individual's constitutional rights or the fair administration of justice. Without a clear pronouncement from this Court about the meaning of *Kordel*, the government will read the decision as a green light to use a civil investigation as the stalking horse for the criminal as long as the agency has its own civil investigative purpose. At the same time, the decision, sanctioning misrepresentation and dissembling by government agents involved in parallel proceedings, promotes uncertainty, fear and distrust in individuals appearing before the SEC and other governmental agencies. Those who find themselves the subjects of civil investigations currently have no

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[10] *Banks, Subprime Lenders to Face Charges*, Oct. 16, 2008, *available at* http://www.cbsnews.com/stories/2008/10/16/business/main4527323.shtml.

[11] Eric Dash, *Federal Investigators to Examine Washington Mutual*, Oct. 16, 2008, N.Y. TIMES, at B12.

clear rules that allow them to make informed decisions about the exercise of their constitutional rights. Consequently, witnesses will be advised to refuse to provide testimony or other evidence to civil authorities fearing that any effort to cooperate may jeopardize their Fifth Amendment rights and lead to criminal exposure. Civil investigations that might be resolved speedily could become needlessly protracted, wasting governmental resources already in short supply.

This case presents the perfect vehicle for this Court to resolve the current confusion and conflict over what amounts to bad faith conduct by the government when enforcement agencies coordinate so extensively that the once-independent civil and criminal investigations merge and in effect become one and the same. The Ninth Circuit decision, if left to stand, endorses a course of conduct that all but erases the boundaries this Court laid down in *Kordel*. The Court should take this opportunity to reestablish the due process protections *Kordel* affirmed .

CONCLUSION

The Court should grant the petition for a writ of certiorari and reverse the decision of the Ninth Circuit Court of Appeals.

Respectfully submitted,

JANET LEE HOFFMAN
Counsel of Record for Petitioner
HOFFMAN ANGELI LLP
1000 S.W. Broadway
Suite 1500
Portland, OR 97205
(503) 222-1125

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, *Plaintiff-Appellant*, v. J. KENNETH STRINGER, III; J. MARK SAMPER; WILLIAM N. MARTIN, *Defendants-Appellees.*	No. 06-30100 D.C. No. CR-03-00432-ALH ORDER AMENDING OPINION AND AMENDED OPINION

Appeal from the United States District Court
for the District of Oregon
Ancer L. Haggerty, District Judge, Presiding

Argued and Submitted
September 26, 2007 – Portland, Oregon

Filed April 4, 2008
Amended July 31, 2008

Before: Mary M. Schroeder, Barry G. Silverman and Jay S. Bybee, Circuit Judges.

Opinion by Judge Schroeder

COUNSEL

Karin J. Immergut, United States Attorney; Hannah Horsley, Assistant United States Attorney; and Kelly A. Zusman, Assistant United States Attorney, Portland, Oregon, for plaintiff-appellant United States of America.

Janet Lee Hoffman, Hoffman Angeli LLP, Portland, Oregon, for defendant-appellee J. Kenneth Stringer, III.

Ronald H. Hoevet, Hoevet, Boise & Olson, P.C., Portland, Oregon, for defendant-appellee Mark Samper.

John S. Ransom and Kendra Matthews, Ransom Blackman LLP, Portland, Oregon, for defendant-appellee William Martin.

ORDER

The opinion in this matter filed on April 4, 2008, and published at *United States v. Stringer*, 521 F.3d 1189 (9th Cir. 2008), is amended as follows:

On slip op. 3549, replace the listed counsel, lines 3-10, with the following:

> Karin J. Immergut, United States Attorney; Hannah Horsley, Assistant United States Attorney; and Kelly A. Zusman, Assistant United States Attorney, Portland, Oregon, for plaintiff-appellant United States of America.
>
> Janet Lee Hoffman, Hoffman Angeli LLP, Portland, Oregon, for defendant-appellee J. Kenneth Stringer, III.
>
> Ronald H. Hoevet, Hoevet, Boise & Olson, P.C., Portland, Oregon, for defendant-appellee Mark Samper.

John S. Ransom and Kendra Matthews, Ransom Blackman LLP, Portland, Oregon, for defendant-appellee William Martin.

On slip op. 3550, replace the first full paragraph with the following:

> Accepting the district court's factual findings under the clear error standard, we hold that the government's conduct does not amount to a constitutional violation under either the Fourth or Fifth Amendments. We vacate the dismissal of the indictments because in a standard form it sent to the defendants, the government fully disclosed the possibility that information received in the course of the civil investigation could be used for criminal proceedings. There was no deceit; rather, at most, there was a government decision not to conduct the criminal investigation openly, a decision we hold the government was free to make. There is nothing improper about the government undertaking simultaneous criminal and civil investigations, and nothing in the government's actual conduct of those investigations amounted to deceit or an affirmative misrepresentation justifying the rare sanction of dismissal of criminal charges or suppression of evidence received in the course of the investigations.

On slip op. 3556, replace the last sentence of the second paragraph with the following:

> Rosenbaum represented Meussle, as well as Samper and FLIR.

On slip op. 3559, replace the citation sentence in the first partial paragraph with the following:

> *See, e.g., United States v. Carriles,* 486 F. Supp. 2d 599, 615, 619 (W.D. Tex. 2007), *appeal pending,* No. 07-50737 (5th Cir.); *United States v. Rand,* 308 F. Supp. 1231, 1233, 1237 (N.D. Ohio 1970).

On slip op. 3568, insert the following as the first full paragraph:

> The panel shall retain jurisdiction over any subsequent appeal in this matter.

Defendant-Appellee Martin's Petition for Rehearing En Banc, Defendant-Appellee Stringer's Petition for Rehearing and Suggestion for Rehearing En Banc, and Defendant-Appellee Samper's Petition for Rehearing En Banc are denied. No subsequent petition for rehearing or rehearing en banc may be filed.

OPINION

SCHROEDER, Circuit Judge:

I. Introduction

The United States appeals from a final order of the district court dismissing criminal indictments against three individual defendants charging counts of criminal securities violations. The dismissal was premised on the district court's conclusion that the government had engaged in deceitful conduct, in

violation of defendants' due process rights, by simultaneously pursuing civil and criminal investigations of defendants' alleged falsification of the financial records of their high-tech camera sales company. Foreseeing the possibility of an appeal, the district court held that the indictments must be dismissed, but ruled in the alternative that, should there be a criminal trial, all evidence provided by the individual defendants in response to Securities and Exchange Commission ("SEC") subpoenas should be suppressed. *See United States v. Stringer*, 408 F. Supp. 2d 1083 (D. Or. 2006).

The court also suppressed evidence relating to the "Swedish Drop Shipment," an allegedly fraudulent accounting entry. The district court reasoned that the government had improperly interfered with, or intruded into, the attorney-client relationship of one of the defendants by accepting incriminating evidence about the entry from a defense attorney. The attorney had an apparent conflict of interest because she represented the corporation as well as an individual defendant.

Accepting the district court's factual findings under the clear error standard, we hold that the government's conduct does not amount to a constitutional violation under either the Fourth or Fifth Amendments. We vacate the dismissal of the indictments because in a standard form it sent to the defendants, the government fully disclosed the possibility that information received in the course of the civil investigation could be used for criminal

proceedings. There was no deceit; rather, at most, there was a government decision not to conduct the criminal investigation openly, a decision we hold the government was free to make. There is nothing improper about the government undertaking simultaneous criminal and civil investigations, and nothing in the government's actual conduct of those investigations amounted to deceit or an affirmative misrepresentation justifying the rare sanction of dismissal of criminal charges or suppression of evidence received in the course of the investigations.

We also reverse the order excluding evidence received from the conflicted attorney. We do so because the government advised the attorney of the existence of a potential conflict and did not interfere with the attorney-client relationship.

II. Background

A. The concurrent SEC civil and U.S. Attorney criminal investigations

Prior to the criminal action that forms the basis of this appeal, the SEC began investigating the defendants, J. Kenneth Stringer, III, J. Mark Samper, and William N. Martin, and their company for possible civil securities fraud violations. The company was FLIR Systems, Inc. ("FLIR"), an Oregon corporation headquartered in Portland that sells infrared and heat-sensing cameras for military and industrial use. The SEC began the investigation on June 8, 2000. About two weeks later, the SEC held the first of a

series of meetings with the Oregon United States Attorney's Office ("USAO") to coordinate the ongoing SEC investigation with a possible criminal investigation. An SEC Assistant Director and an SEC Staff Attorney met with the supervisor of the white collar crime section of the USAO to discuss the possibility of opening a criminal investigation. The meeting apparently convinced the USAO supervisor to investigate. Within days, the USAO and the Federal Bureau of Investigation ("FBI") opened a criminal investigation.

Federal securities laws authorize the SEC to transmit evidence it has gathered to the USAO to facilitate a criminal investigation by the USAO. *See* 15 U.S.C. §§ 77t(b), 78u(d). To gather evidence for its criminal investigation, the Oregon USAO in June of 2000 sent a letter to the SEC (the "Access Letter") requesting access to the SEC's non-public investigative files, and the SEC promptly granted access.

The civil and criminal investigations proceeded in tandem and the SEC continued to meet and communicate with the USAO and FBI. The SEC turned over documents the SEC collected through its civil investigation.

At the beginning of the criminal investigation, the USAO identified two of the three defendants, FLIR's former CEO, Stringer, and former CFO, Samper, as possible targets, and named them in the USAO's Access Letter to the SEC. A few months later, in October 2000, the Assistant United States Attorney ("AUSA") assigned to the case made a list of the

subjects of the investigation and placed asterisks and the comment "knew what [was] going on" next to the entries for Samper and Stringer. A month later, the AUSA stated in his handwritten notes that Stringer had "lied [about] his role in" the company. In April 2001, an e-mail from the SEC Staff Attorney to the SEC Assistant Director stated the AUSA "define[d] [the] targets as Ken Stringer and Mark Samper."

The district court concluded that the third defendant, Martin, former VP of Sales, was also an early potential target of the criminal investigation. Martin appears on the AUSA's early list of the subjects of the investigation above the comment "knew pushing up sales." During a January 2001 meeting, the SEC advised the USAO and FBI that FLIR was blaming Stringer and Martin for the fraudulent conduct at the heart of the investigation.

Early in the criminal investigation, the USAO decided the investigation should remain confidential. At an October 2000 meeting between the SEC, USAO, and FBI, the AUSA advised that the evidence collected by the SEC might support criminal wire fraud charges. Nonetheless, an internal FBI memo issued in late October stated that the AUSA had concluded, based on the defendants' cooperation with the SEC at that point, that the SEC should investigate "without the assistance or inclusion of the FBI." At the January 2001 meeting between the SEC, FBI, and USAO, the SEC revealed that FLIR was cooperative and was providing evidence that was damaging to Stringer and Martin.

By June 2001, the USAO was not yet ready to convene a grand jury and issue indictments. The SEC and USAO believed that FLIR and defendant Samper would settle with the SEC so long as the U.S. Attorney was not directly involved. During a December 2001 phone conversation between the AUSA assigned to the case and the SEC Assistant Director, the AUSA continued to believe it was "premature [sic] to surface" and that the presence of an AUSA would "impede" a meeting between the SEC and defendants. During a December 2002 phone call, the SEC and USAO decided that the USAO would not "surface", i.e., convene a grand jury and issue indictments, until the "end of Jan/early Feb" 2003.

The SEC facilitated the criminal investigation in a number of ways. The SEC offered to conduct the interviews of defendants so as to create "the best record possible" in support of "false statement cases" against them, and the AUSA instructed the SEC Staff Attorney on how best to do that. The AUSA asked the relevant SEC office, located in Los Angeles, to take the depositions in Oregon so that the Portland Office of the USAO would have venue over any false statements case that might arise from the depositions, and the SEC did so. Both the SEC and USAO wanted the existence of the criminal investigation kept confidential. The SEC Staff Attorney, at one of the Portland depositions, made a note that she wanted to "make sure [the] court reporters won't tell [FLIR's Attorney]" that there was an AUSA assigned to the case.

The SEC, however, did not hide from the defendants the possibility – even likelihood – of such an investigation. The SEC sent each of the defendants subpoenas in the summer of 2001, and attached to each was Form 1662, a form sent to all witnesses subpoenaed to testify before the SEC. Under the header "Routine Uses of Information," the four-page form states that "[t]he Commission often makes its files available to other governmental agencies, particularly the United States Attorneys and state prosecutors. There is a likelihood that information supplied by you will be made available to such agencies where appropriate."

Form 1662 also advises witnesses of their Fifth Amendment rights. After the heading "Fifth Amendment and Voluntary Testimony," the form states that:

> Information you give may be used against you in any federal . . . civil or criminal proceeding brought by the Commission of any other agency. You may refuse, in accordance with the rights guaranteed to you by the Fifth Amendment of the Constitution of the United States, to give any information that may tend to incriminate you or subject you to fine, penalty, or forfeiture.

None of the defendants invoked his right against self-incrimination during his deposition, and all proceeded to testify in compliance with the subpoena. Each of the defendants was represented by counsel when he testified.

During the course of Stringer's deposition, taken in Portland in October 2001, Stringer's attorney actually questioned the SEC Staff Attorney about the involvement of the USAO. In response to those questions, the SEC Staff Attorney answered as follows:

> MR. MARTSON: My first question is whether Mr. Stringer is a target of any aspect of the investigation being conducted by the SEC.
>
> STAFF ATTORNEY: The SEC does not have targets in this investigation.
>
> MR. MARTSON: The other questions I have relate to whether or not, in connection with your investigation, the SEC is working in conjunction with any other department of the United States, such as the U.S. Attorney's Office in any jurisdiction, or the Department of Justice.
>
> STAFF ATTORNEY: As laid out in the 1662 form, in the "routine use of" section there are routine uses of our investigation, and it is the agency's policy not to respond to questions like that, but instead, to direct you to the other agencies you mentioned.
>
> MR. MARTSON: And which U.S. Attorney's Office might I inquire into?
>
> STAFF ATTORNEY: That would be a matter up to your discretion.

The record does not show the SEC did anything to impede an inquiry, nor does it disclose that any

inquiry was made. The record reflects that the government never furnished defendants with any false information concerning the existence of a criminal investigation.

In September 2002, a year before the criminal indictments, defendants Samper and Martin entered into consent decrees in the civil action, agreeing to pay penalties, disgorgement, and pre-judgment interest.

B. The "Swedish Drop Shipment" evidence from the attorney jointly representing defendants

Throughout the course of the SEC investigation, FLIR was represented by attorney Lois Rosenbaum. Defendant Samper, FLIR's former CFO, had retained separate counsel. In March 2000, Rosenbaum sent Samper a letter offering to jointly represent FLIR, Stringer, and Samper. In the letter, Rosenbaum claimed that based on her "present knowledge of the facts," she did not anticipate that any conflicts would arise between the co-clients. The letter, however, advised the clients to consult separate counsel before consenting to the joint representation and promised immediately to inform the clients if a conflict did arise.

Samper's separate counsel sent a letter to Rosenbaum stating that Samper consented to the "joint representation in spite of the potential conflict of interest that may arise between the clients." Samper's

separate counsel continued to represent him as monitoring counsel.

On June 30, 2000, the SEC sent Samper a subpoena with Form 1662 enclosed. It warned of possible dangers of joint representation. The form advised that "[y]ou may be represented by counsel who also represents other persons involved in the Commission's investigation. This multiple representation, however, presents a potential conflict of interest if one client's interests are or may be adverse to another's."

In July 2000, when the SEC learned that Rosenbaum was representing FLIR and its employees, it immediately sent her a letter warning of the specific dangers of this co-representation. "We are concerned that the broad range of interests possessed by your many clients cannot be adequately represented by a single attorney." The letter specifically pointed out the potential conflict of interest in representing a company under investigation by the SEC and upper level management who may have civil liability. The letter stated that, "Although it is far too early in the investigation for the SEC staff to identify people who may possess liability, we are troubled by the scope and breadth of your representation." Rosenbaum continued to represent both FLIR and Samper, among others.

One of the eventual charges in the indictment was that two of the involved defendants created the "Swedish Drop Shipment," an entry in FLIR's books

that allegedly recognizes $4.6 million in revenue without substantiation. FLIR's Controller, David Meussle, first discovered the unsubstantiated entry. Meussle believed that Stringer and Samper made the entry. Rosenbaum represented Meussle, as well as Samper and FLIR.

The SEC civil complaint, filed on September 30, 2002, two years after the joint representation began, did not allege a charge relating to the "Swedish Drop Shipment." After Rosenbaum received a copy of the complaint, she called the SEC Staff Attorney, disclosed the existence of the "Swedish Drop Shipment," and facilitated SEC interviews with Meussle in order to enhance the level of FLIR's cooperation with the government. Rosenbaum also sent a memo to the SEC that contained possibly privileged communications she had with Samper about the transaction. The criminal indictment later charged that Stringer and Samper created the false entry. Thus Rosenbaum, while representing Meussle and FLIR, apparently in order to further the interests of FLIR, assisted the SEC's investigation.

C. Proceedings Below

On September 17, 2003, a grand jury returned an indictment charging Stringer, Samper, and Martin with securities, mail, and wire fraud. Defendants filed motions to dismiss the indictments and to suppress statements they made to the SEC. The district court dismissed the indictments and suppressed the

SEC statements because it concluded that the government, in violation of the due process clause, abused its authority to conduct parallel proceedings. *United States v. Stringer,* 408 F. Supp. 2d 1083, 1088-89 (D. Or. 2006). The district court held that the government violated defendants' Fifth Amendment due process rights by using trickery and deceit to conceal the criminal investigation from defendants, *id.* at 1080, and conducting a criminal investigation under the auspices of a civil investigation, *id.* at 1089. The district court suppressed evidence of the "Swedish Drop Shipment" on the basis of its conclusion that the government interfered with Samper's attorney-client relationship in violation of his due process rights. *Id.* at 1091-92.

This appeal by the government followed. This court has jurisdiction pursuant to 18 U.S.C. § 3731.7

III. Discussion

A. The parallel investigations

The Supreme Court has held that the government may conduct parallel civil and criminal investigations without violating the due process clause, so long as it does not act in bad faith. *See United States v. Kordel,* 397 U.S. 1, 11 (1970). In *Kordel,* the Supreme Court held that the government did not violate the due process rights of corporate executives when it used evidence it obtained from an FDA civil investigation to convict them of criminal misbranding. 397 U.S. at 11. The Court explained that the FDA did not

act in bad faith when it made a request for information, which ultimately was used in the criminal investigation, for the agency made similar requests as a matter of course in 75% of its civil investigations. *Id.* at 6. The Court suggested that the government may act in bad faith if it brings a civil action solely for the purpose of obtaining evidence in a criminal prosecution and does not advise the defendant of the planned use of evidence in a criminal proceeding. *Id.* at 12-13. The Court thus distinguished the *Kordel* investigation from bad faith cases where

> the [g]overnment has brought a civil action solely to obtain evidence for its criminal prosecution or has failed to advise the defendant in its civil proceeding that it contemplates his criminal prosecution; . . . [or] any other special circumstances . . . might suggest the unconstitutionality or even the impropriety of this criminal prosecution.

Id. at 12-13.

The Supreme Court has not had occasion to address such issues since *Kordel,* but lower courts have. In *SEC v. Dresser Industries, Inc.,* the D.C. Circuit applied the principles laid down in *Kordel* to a case involving parallel SEC civil and Department of Justice criminal investigations. *See* 628 F.2d 1368, 1376-77 (D.C. Cir. 1980) (en banc). The court emphatically upheld the propriety of such parallel investigations. "Effective enforcement of the securities laws requires that the SEC and Justice be able to investigate possible violations simultaneously." *Id.* at

1377. The court said it would refuse to bar such investigations absent unusual circumstances. *Id.* It said courts should refuse to "block parallel investigations by these agencies in the absence of 'special circumstances' in which the nature of the proceedings demonstrably prejudices substantial rights of the investigated party or of the government." *Id.*

District courts have occasionally suppressed evidence or dismissed indictments on due process grounds where the government made affirmative misrepresentations or conducted a civil investigation solely for purposes of advancing a criminal case. *See, e.g., United States v. Carriles,* 486 F. Supp. 2d 599, 615, 619 (W.D. Tex. 2007), *appeal pending,* No. 07-50737 (5th Cir.); *United States v. Rand,* 308 F. Supp. 1231, 1233, 1237 (N.D. Ohio 1970).

In this case, the district court concluded that the government should have told defendants of the criminal investigation and that it violated the standards laid down in *Kordel* when it failed to "advise defendants that it anticipated their criminal prosecution." *Stringer,* 408 F. Supp. 2d at 1088. It held that the government engaged in "trickery and deceit" when the SEC staff attorney instructed court reporters to refrain from mentioning the AUSA's involvement. When the SEC staff attorney responded to Stringer's attorney's question, during Stringer's deposition, by directing him to the U.S. Attorney, the district court concluded that the SEC attorney "evaded the question." *Id.* at 1089.

In its appeal, the government argues that it had no legal duty to make any further disclosure of the existence of the pending criminal investigation. It points to the warnings in Form 1662 in which the government disclosed the possibility of criminal prosecution, and it stresses that it did not make any affirmative misrepresentations. It maintains the SEC attorney's answer was appropriate and truthful.

The defendants argue that the district court properly held that the use of the evidence obtained by the SEC in a criminal prosecution would violate defendants' Fifth Amendment privilege against self-incrimination. The defendants were advised that the evidence could be used in a criminal investigation, but defendants did not invoke their Fifth Amendment privilege during the SEC investigation. The government on appeal correctly contends that defendants waived or forfeited their Fifth Amendment right against self-incrimination.

The privilege against self-incrimination protects an individual from being forced to provide information that might establish a direct link in a chain of evidence leading to his conviction. *Hoffman v. United States,* 341 U.S. 479, 486 (1951). It may be waived if it is not affirmatively invoked. In *Minnesota v. Murphy,* the Supreme Court stressed that the privilege is lost if not affirmatively invoked, even if the defendant did not make a knowing and intelligent waiver. 465 U.S. 420, 428 (1984). We have similarly stated that a "defendant's failure to invoke the privilege against self-incrimination waives a later claim of privilege."

Unruh, 855 F.2d at 1374 (holding that a defendant waived the privilege when, after being advised of his right not to answer questions, he proceeded to testify in a civil deposition).

The district court therefore erred in holding that defendants' waivers of the privilege were ineffective because they were not told of the U.S. Attorney's active involvement. *See Stringer,* 408 F. Supp. 2d at 1089-90. The SEC Form 1662 used in this case alerts SEC investigative witnesses that the information can be used in a criminal proceeding. Defendants were on sufficient notice, and so were their attorneys. As one federal court has explained, all that was required was "sufficient notice . . . that any information could be used against [them] in a subsequent criminal proceeding." *United States v. Teyibo,* 877 F. Supp. 846, 855 (S.D.N.Y. 1995). That court emphasized that "SEC Form 1662 stated in no uncertain terms that the [g]overnment's request for information could be refused pursuant to the Fifth Amendment's protection against compelled self-incrimination." *Id.* We agree.

The SEC here went even further, warning each defendant at the beginning of each deposition that "the facts developed in this investigation might constitute violations of . . . criminal laws." Nonetheless, defendants proceeded to testify and failed to invoke their privilege against self-incrimination. Defendants have forfeited any claims that the use of their testimony against them in the criminal proceedings violates the privilege against self-incrimination.

The defendants next contend that the district court properly concluded that the government used the civil investigation solely to obtain evidence for a subsequent criminal prosecution, in violation of due process. The Supreme Court in *Kordel* made it clear that dual investigations must meet the requirements of the Fifth Amendment Due Process Clause. *See* 397 U.S. at 11-12. While holding that "[i]t would stultify the enforcement of federal law" to curtail the government's discretion to conduct dual investigations strategically, the Court suggested that a defendant may be entitled to a remedy where "the [g]overnment has brought a civil action solely to obtain evidence for its criminal prosecution." 397 U.S. at 11-12. In this case, the government argues that it did not violate defendants' due process rights because the civil investigation was not commenced solely to obtain evidence for a criminal prosecution.

It is significant to our analysis that the SEC began its civil investigation first and brought in the U.S. Attorney later. This tends to negate any likelihood that the government began the civil investigation in bad faith, as, for example, in order to obtain evidence for a criminal prosecution. In *United States v. Unruh,* 855 F.2d 1363, 1374 (9th Cir. 1987), we held that a defendant was not entitled to dismissal of his indictment when the U.S. Department of the Treasury instituted its investigation before any indictment and in order to file its own civil complaint. *See also United States v. Churchill,* 483 F.2d 268, 272 (1st Cir.

1973); *United States v. Teyibo*, 877 F. Supp. 846, 855 (S.D.N.Y. 1995).

United States v. Carriles, 486 F. Supp. 2d 599, 619-21 (W.D. Tex. 2007), on the other hand, is a clear example of government bad faith. The district court dismissed an indictment because the U.S. Citizenship and Immigration Services ("USCIS") interviewed the defendant solely to collect evidence in support of a criminal case against him. 486 F. Supp. 2d at 619-21. The defendant, a Cuban national, filed an application for naturalization. *Id.* at 601. Although USCIS had already determined that the defendant was not eligible for citizenship, the agency nonetheless invited him to a pre-citizenship interview in order to collect evidence for a criminal false statements case. *Id.* at 619. The interview protocol was altered in so many ways to serve the needs of the criminal investigation that it became an interrogation. The court described the "interview" as follows:

> (1) it lasted eight hours over the course of two days as opposed to the usual maximum of thirty minutes, (2) it involved two interviewers, (3) the [g]overnment provided an interpreter, (4) there were a total of four attorneys present – two defense attorneys and two Government attorneys, and (5) it was both audio and videotaped.

Id. Because the "entire interview was . . . a pretext for a criminal investigation," the district court dismissed the indictment. *Id.* at 629-20.

Our case is not remotely similar to *Carriles*. In this case the SEC's civil investigation was opened first, led to SEC sanctions and was conducted pursuant to the SEC's own civil enforcement jurisdiction. It was not a pretext for the USAO's criminal investigation of defendants. Congress has expressly authorized the SEC to share information with the Department of Justice to facilitate the investigation and prosecution of crimes. *See* 15 U.S.C. §§ 77t(b), 78u(d). We must conclude the SEC interviewed the defendants in support of a bona fide civil investigation. There was no violation of due process.

Defendant appellees finally contend that the district court properly concluded that dismissal or, in the alternative, suppression, was warranted because the government lulled the defendants into turning over incriminating evidence by engaging in "trickery and deceit." It was dispositive for the district court that the SEC staff attorney instructed court reporters to refrain from mentioning the AUSA's involvement and that the SEC gave evasive answers to questions about the imminence of a dual investigation. We have previously applied the Fourth Amendment's bar to unreasonable searches and seizures in the context of dual investigations by the civil and criminal branches of the IRS, where review of documentary evidence is inherent in the investigation. We have thus held that a search is unreasonable, even if consensual, if the consent is obtained by trickery or deceit. *See United States v. Robson*, 477 F.2d 13, 18 (9th Cir. 1973). While not every SEC and USAO dual investigation

will necessarily involve a search and seizure, to the extent that the individual defendants may have been led through trickery or deceit to turn over documentary or physical evidence in their possession or to use their official authority to turn over evidence in the possession of the corporation, the defendants could state a claim under the Fourth Amendment.

A government official must not "affirmatively mislead" the subject of parallel civil and criminal investigations "into believing that the investigation is exclusively civil in nature and will not lead to criminal charges." *Robson,* 477 F.2d at 18. However, "we have consistently held that the failure of an IRS agent . . . to warn a taxpayer that an audit may have potential criminal ramifications does not render the search unreasonable." *Id.* at 18-19 (denying suppression where an IRS agent did not expressly advise a taxpayer that the evidence the agent was gathering for a civil audit would be used to support a criminal investigation).

Other circuits have agreed that Fourth Amendment and possible due process limitations may be implicated in a dual investigation. *See United States v. Peters,* 153 F.3d 445, 451 (7th Cir. 1998) ("A consensual search is unreasonable under the Fourth Amendment or violative of due process under the Fifth Amendment if the consent was induced by fraud, deceit, trickery or misrepresentation."). Almost every other circuit has denied suppression, even when government agents did not disclose the possibility or existence of a criminal investigation, so long as

they made no affirmative misrepresentations. *See United States v. Irvine,* 699 F.2d 43, 46 (1st Cir. 1983); *United States v. Sclafani,* 265 F.2d 408, 414-415 (2d Cir. 1959); *United States v. Parenti,* 326 F.Supp. 717, 722 (E.D. Pa. 1971), *aff'd,* 470 F.2d 1175 (3rd Cir. 1971); *Groder v. United States,* 816 F.2d 139, 144 (4th Cir. 1987); *United States v. Prudden,* 424 F.2d 1021, 1030 (5th Cir. 1970); *United States v. Marra,* 481 F.2d 1196, 1203 (6th Cir. 1973); *United States v. Lehman,* 468 F.2d 93, 105 (7th Cir. 1972); *United States v. Grunewald,* 987 F.2d 531, 534 (8th Cir. 1993); *United States v. Kaatz,* 705 F.2d 1237, 1243 (10th Cir. 1983); *United States v. Wuagneux,* 683 F.2d 1343, 1347 (11th Cir. 1982); *United States v. Stamp,* 458 F.2d 759, 777 (D.C. Cir. 1971).

The district court in this case relied on the Eighth Circuit's opinion in *Grunewald,* which said it would be a "flagrant disregard of individuals' rights" to "deliberately deceive, or even lull" a person into incriminating themselves in a criminal investigation being pursued under the guise of a civil one. 987 F.2d at 534. The Eighth Circuit was referring to the criminal defendant's argument that he was the victim of a criminal investigation being pursued in the guise of a civil tax audit. *Id.* The court rejected the argument and affirmed the district court's denial of suppression because there had been no deceit. *Id.* We applied virtually the same standard in *Robson,* where we held that suppression was not appropriate in the absence of affirmative misrepresentations. 477 F.2d at 17-18.

In this case, the SEC made no affirmative misrepresentations. The SEC did advise defendants of the possibility of criminal prosecution. The SEC engaged in no tricks to deceive defendants into believing that the investigation was exclusively civil in nature. The SEC's Form 1662 explicitly warned defendants that the civil investigation could lead to criminal charges against them: "Information you give may be used against you in any federal . . . civil or criminal proceeding brought by the Commission or any other agency." Defendants were represented by counsel, and the government provided counsel, so far as this record reflects, with accurate information. The standard we laid down in *Robson* was not violated.

The defendant-appellees point to a number of collateral facts they argue demonstrate trickery or deliberate misleading. They argue the SEC Staff Attorney affirmatively misled Stringer's attorney when, in response to the attorney's question about other agency involvement, she directed him to the provision in Form 1662 that warned that the SEC would likely turn over to the USAO evidence it collected at the depositions. The Staff Attorney, during the deposition taken in Portland, declined to direct defense counsel to a specific U.S. Attorney's Office, which would have been the Portland Office, but there was nothing false or misleading in her response that it was up to the defendant to decide where to direct his inquiries.

The defendant-appellees also point to the Staff Attorney's request to the court reporters not to mention the AUSA in the presence of defendants' attorneys. While this indicates an intent to prevent disclosure to defendants of the actual criminal investigation, the possibility of criminal investigation should have been well known to both the defendants and their counsel. The request to the court reporters to, in effect, mind their own business did not mislead or misinform defendants about the existence of an investigation. Thus, to the extent that the Fourth Amendment may have been implicated by the dual investigation, the district court erred in concluding that the government's actions in this case constituted an unreasonable search or seizure.

B. Interference with Samper's attorney-client relationship

The district court concluded that the government violated defendant Samper's due process rights when it obtained evidence about the "Swedish Drop Shipment" from Samper's attorney, knowing that she had a conflict of interest. *Stringer,* 408 F. Supp. 2d at 1092. The government argues that it did not deliberately intrude into Samper's attorney-client relationship because all that it did was receive information that Samper's attorney offered the government, wholly independent of any government conduct.

We have held that "government interference with a defendant's relationship with his attorney may

render counsel's assistance so ineffective as to violate . . . his Fifth Amendment right to due process of law." *United States v. Irwin*, 612 F.2d 1182, 1185 (9th Cir. 1980). "'[A] claim of outrageous government conduct premised upon deliberate intrusion into the attorney-client relationship will be cognizable where the defendant can point to actual and substantial prejudice.'" *United States v. Haynes*, 216 F.3d 789, 797 (9th Cir. 2000) (quoting *United States v. Voigt*, 89 F.3d 1050, 1067 (3d Cir. 1996)). A claim of government interference with the attorney-client relationship has three elements: (1) the government was objectively aware of an ongoing, personal attorney-client relationship; (2) the government deliberately intruded into that relationship; and (3), as a result, the defendant suffered actual and substantial prejudice. *Voigt*, 89 F.3d at 1067.

Most cases finding deliberate intrusion into the attorney-client relationship involve government informants who somehow penetrate the attorney-client relationship to obtain confidential or privileged information, and then feed that information to the government. *See, e.g., Haynes*, 216 F.3d at 793-94. In *Haynes*, the defendant's attorney's investigator served as a paid informant for the government. *Id.* at 792. In *United States v. Marshank*, 777 F. Supp. 1507, 1519-1520 (N.D. Cal. 1991), the defendant's attorney served as an unpaid informant for the government by providing the government confidential client information on a regular basis. In contrast, we have held that the government's asking a defendant's

former attorney to turn over privileged information does not constitute deliberate intrusion on the part of the government when the attorney complies. *See United States v. Rogers*, 751 F.2d 1074, 1080 (9th Cir. 1985). "The fact that the attorney failed to assert the ethical obligation does not transform [the government's] investigation into governmental misconduct." *Id.*

For similar reasons, there was no deliberate government interference here. The government did not deliberately intrude into the relationship between Samper and Rosenbaum when it accepted potentially incriminating evidence from Rosenbaum, nor was Rosenbaum a government informant whom the government sought out. *Cf. Haynes*, 216 F.3d at 793-94. In fact, in Form 1662, the government explicitly warned Samper that "[y]ou may be represented by counsel who also represents other persons involved in the Commission's investigation. This multiple representation, however, presents a potential conflict of interest if one client's interests are or may be adverse to another's." The conflict resulted from Rosenbaum's decision, wholly independent of the government, to represent FLIR and Samper. Samper had full knowledge of a potential conflict and consented to the representation. There was no impropriety on the government's part.

Indeed, had the government contacted Samper directly to warn him about the conflict, bypassing his attorney, the government would have engaged in conduct that itself may have amounted to interference.

Cf. Or. Rules of Prof'l Conduct R. 4.2; Model Rules of Prof'l Conduct R. 4.2. The government's receipt of evidence from counsel intended to assist one client, but that also tended to incriminate another, was not an intrusion or intentional interference with the attorney-client relationship and did not justify dismissal of the indictment or suppression of the evidence of the "Swedish Drop Shipment."

IV. Conclusion

For the foregoing reasons, we conclude that there was no deception or affirmative misconduct on the part of the government in the course of the SEC and U.S. Attorney investigations that warranted dismissal of the indictment or suppression of any of the evidence in question. In addition, defendants' Fifth Amendment rights were not violated.

The panel shall retain jurisdiction over any subsequent appeal in this matter.

The judgment of the district court dismissing the indictment is **VACATED**. The district court's suppression ruling is **REVERSED**. The case is **REMANDED** for further proceedings.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

UNITED STATES OF AMERICA,

Plaintiff,

v.

J. KENNETH STRINGER, *et al.*,

Defendants.

CR 03-432-HA

OPINION AND ORDER

HAGGERTY, Chief Judge:

On September 23, 2004, the grand jury issued a Third Superseding Indictment (hereinafter referred to as the Indictment) charging defendants J. Kenneth Stringer (Stringer), J. Mark Samper (Samper), and William N. Martin (Martin) with fifty counts of conspiracy and securities fraud. Defendants are former executives of FLIR Systems, Inc. (FLIR). The Indictment alleges that defendants acted in concert to inflate FLIR's revenues through a series of fraudulent revenue recognition and accounting practices in an attempt to defraud FLIR, its Board of Directors, its shareholders, its auditors, and the United States Securities and Exchange Commission (SEC).

Defendants filed separate Motions to Dismiss the Indictment, or in the Alternative, Suppress Testimony (Docs. #166, 182, 188). The court held eleven days of evidentiary hearings. Oral arguments were heard on November 15-16, 2005. The court rules on each motion in turn below.

Defendant Stringer and Martin's Motions to Dismiss/Suppress

Defendants Stringer and Martin seek to dismiss the Indictment, or, in the alternative, suppress the statements they made to the SEC because the information was produced in violation of their Fourth and Fifth Amendment rights. Specifically, defendants assert that had they been notified of the possibility of the criminal prosecution, they would have sought a stay of the civil proceedings, would not have produced any documents and Martin would not have provided a Wells Submission. Defendants seek dismissal of the Indictment or, alternatively, suppression of their statements made to the SEC in the prosecution's case-in-chief and for impeachment and rebuttal evidence, suppression of all documents provided to the SEC, vacation of the civil judgment entered into by Martin, invalidation of the consent decree, and suppression of Martin's Wells Submission.

The SEC began its investigation of defendants in mid-2000. Shortly thereafter, Assistant United States Attorney Charles Gorder (Gorder) met with Diana Tani, an officer with the SEC, and later requested access to the SEC's investigative files of defendants. Gorder indicated that he was making the request pursuant to ongoing investigation of defendants by the United States Attorney Office's (USAO) and the Federal Bureau of Investigation's (FBI). Gorder also indicated that defendants were the subjects of a Department of Justice investigation.

In August 2000 the SEC met with Assistant United States Attorney Kent Robinson (Robinson) for a preliminary discussion regarding the investigation of defendants. In October 2000 the SEC, the FBI and Robinson met again for an extensive discussion of the case. The SEC provided the USAO and the FBI with five notebooks of documents and a detailed memorandum setting forth the SEC's legal and factual analyses. At this meeting it was decided that the criminal investigation would abate in order to continue receiving statements from defendants and other witnesses through the civil investigation. In a memorandum memorializing the meeting, FBI Agent Boyer wrote:

> It was determined that since Stringer has agreed to be interviewed by the SEC, the FBI will make no effort to interview Stringer or other corporate officers at this time so as not to jeopardize the opportunity to obtain statements from these individuals.

Stringer Ex. 59, Letter from Agent Boyer, FBI, to Kristine Olson, SEC, at 2 (October 20, 2000).

Ten days after meeting with the SEC and FBI, Robinson requested funding for a computer system for the FLIR investigation and stated that absent a "persuasive and complete explanation" the case "warrants prosecution." Stringer Ex. 101, Memorandum from Kent Robinson, to Judy Kobbervig, *et. al.*, USAO, at 2 (October 13, 2000). Robinson noted that the USAO would "benefit greatly" from the SEC's investigation and stated that the "probability of

prosecution is very high." *Id.* Robinson also identified Martin, Stringer and Samper as potential targets. Stringer Ex. 100, Handwritten Notes of Kent Robinson, at 3 (October 3, 2000).

In January 2001 the SEC investigators visited the FLIR facilities. Following the visit, the SEC, FBI and USAO met to discuss the progress of the investigation. In that meeting it was decided that the criminal investigators would continue to allow the civil investigators to handle the investigation. In a memorandum memorializing the meeting, FBI Agent Boyer stated that "AUSA Robinson advised that based on the level of cooperation that the new FLIR management team has extended to the SEC, no overt investigation will be conducted by the FBI at this time." Stringer Ex. 62, Memorandum from Agent Boyer, FBI, to Gordon Compton, FBI, at 3 (February 5, 2001).

The USAO continued to rely on the work product generated by the SEC investigators. Robinson explained that FLIR was cooperating and so "a decision was made not to pursue a parallel grand jury investigation" but to "passively observe[ ] the results of the SEC's work." Stringer Ex. 101, Memorandum from Robinson to Judy Kobbervig, *et. al.*, at 1 (April 4, 2001). Robinson noted this strategy had "provided good investigative results, at little cost to us" and that the "SEC's investigation continues to suggest that this case will produce a criminal prosecution." *Id.* Robinson also reiterated that the investigation continued to implicate Stringer and Samper. *Id.*

The civil and criminal investigators communicated regularly throughout the civil investigation, exchanging information and discussing strategy. Robinson advised the SEC that he was interested in false testimony cases and explained how to create the best record possible for such cases. Stringer Ex. 66, E-mail from Lorraine Echavarria, SEC, to Diana Tani, *et. al.*, SEC, at 1 (April 5, 2001). The SEC forwarded this information to "all testimony takers so that we will know and understand what Kent needs/wants to prosecute a false testimony case." *Id.* The SEC also agreed to conduct certain interviews in Oregon to provide potential jurisdiction for the Oregon USAO, despite the inconvenience to the SEC investigation.

Robinson identified to the SEC that Samper and Stringer were targets. *Id.* The SEC expressed a desire to "convince him to expand" targets beyond Samper and Stringer. *Id.* A few months later the USAO and FBI traveled to Los Angeles to meet with the SEC and maintained that Samper, Stringer, Martin and two others were targets of the investigation. Stringer Ex. 71, Memorandum from Agent Compton, FBI, to Agent Boyer, FBI, at 2 (July 5, 2001).

In June 2001 SEC attorney Lorraine Echavarria (Echavarria) and Assistant United States Attorney Allan Garten (Garten) discussed the criminal investigation and decided to wait before commencing parallel proceedings, noting that with such proceedings the SEC action would be stayed and that defendants and FLIR would most likely settle unless the USAO was involved. Stringer Ex. 69, Handwritten Notes of

Echavarria, at 3 (June 6, 2001) (hereinafter Stringer Ex. 69). In December 2001, the SEC and USAO decided it was still "premature to surface," and that the presence of the USAO would "impede" a scheduled meeting with FLIR. Stringer Ex. 75, Handwritten Notes of Diana Tani, at 1 (December 19, 2001).

The civil investigators were aware of the need to suppress the presence of the USAO. Echavarria noted to "make sure court reporters won't tell [FLIR's attorney] about Kent." Stringer Ex. 60, Handwritten Note of Echavarria. Echavarria also wrote to Assistant United States Attorney Allan Garten (Garten), requesting he stay away from SEC interviews because FLIR's attorney would be present and noting "[i]f you plan to surface to company [FLIR] counsel soon, that is a decision we would like to discuss with you prior to you making it." Stringer Ex. 70, E-mail from Echavarria, SEC, to Garten, USAO, at 1 (July 3, 2001). Echavarria and Garten discussed the strategy for the case and decided that the USAO would "surface end of Jan/early Feb [2003]" and with "no notice." Stringer Ex. 94, Handwritten Note of Echavarria (December 20, 2002).

Defendants were subpoenaed to testify before the SEC and were informed that disclosure of information to the SEC is mandatory, subject to the valid assertion of any legal right or privilege. The subpoenas also stated that failure to provide information could result in a court order compelling such information followed by criminal sanctions. Defendants were given the standard SEC Form 1622, which is given to

all testifying witnesses. This form informs witnesses of their right to counsel, their Fifth Amendment rights, and the routine uses of information. The "routine uses" listed included a proviso that the SEC often makes its files available to other governmental agencies, particularly the USAO. Form 1662 also noted that any information given to the SEC may be used in any federal criminal proceeding.

Defendants assert that their due process rights were violated because they were not advised that the prosecutor and the FBI were using the SEC to gather evidence for a criminal prosecution. They argue that this prejudiced them because their Fifth Amendment right not to be compelled to testify was removed; they lost the opportunity to seek immunity from, or to cooperate with the prosecution; they were unable to seek a stay of the proceedings; the prosecutor and the FBI were granted more discovery than they would have been entitled to under the Federal Rules of Criminal Procedure; and Martin provided to the prosecution through the Wells Submission any and all defenses he may have had to the subsequent criminal charges.

Stringer testified before the SEC on October 29, 2001. He asserts that neither he, nor his attorney, was aware that the prosecution was contemplating criminal charges against him. In a dialogue with Echavarria, Stringer's attorney asked the following questions and received the following responses:

STRINGER'S ATTORNEY: My first question is whether Mr. Stringer is the target of any aspect of the investigation being conducted by the SEC.

ECHAVARRIA: The SEC does not have targets in this investigation.

STRINGER'S ATTORNEY: The other questions I have relate to whether or not, in connection with your investigation, the SEC is working in conjunction with any other department of the United States, such as the U.S. Attorney's Office in any jurisdiction, or the Department of Justice.

ECHAVARRIA: As laid out in the 1662 form, in the "routine use of" section there are routine uses of our investigation, and it is the agency's policy not to respond to questions like that, but instead, to direct you to the other agencies you mentioned.

STRINGER'S ATTORNEY: And which U.S. Attorney's office might I inquire into?

ECHAVARRIA: That would be a matter up to your discretion.

Defendant Stringer's Memorandum in Support of Motion to Dismiss, Ex. 8.

Defendants argue that the SEC and USAO worked together on a single investigation, with the USAO hiding behind the SEC to sidestep defendants' constitutional rights that they would have otherwise

asserted in the criminal proceeding, and build up its criminal case against them.

The prosecution argues that the USAO and the SEC were conducting parallel proceedings, which is an acceptable approach for civil and criminal authorities investigating the same matter. *See United States v. Kordel,* 397 U.S. 1, 11 (1970); *Securities and Exchange Comm'n v. Dresser Indust.,* 628 F.2d 1368 (D.C. Cir. 1980). The prosecution also argues that defendants were provided with adequate notice that their statements could be used in a criminal prosecution through Form 1662.

The court concludes that these were not parallel investigations. The USAO identified potential criminal liability and a few targets in the beginning of the investigation, and elected to gather information through the SEC instead of conducting its own investigation. The government was concerned that the presence of a criminal investigation would halt the successful discovery by the SEC, witnesses would be less cooperative and more likely to invoke their constitutional rights, and that the rules of criminal discovery would be invoked. Stringer Ex. 69, at 3 (June 6, 2001) (memorializing a telephone conversation between Echavarria and Garten wherein Garten explains that once there is an indictment "discovery is over. Criminal is totally 1 sided" and that he would then give everything and get nothing). The government was aware that there was no parallel proceeding. *See* Stringer Ex. 78, Draft E-mail from Diana Tani to Laurie Stegman (noting that Garten wanted

to see what the SEC put together "rather than running his own parallel criminal investigation"); Stringer Ex. 101, Memorandum from Robinson to Judy Kobbervig, *et. al.*, at 1 (April 4, 2001) (stating that a decision was made "not to pursue a parallel grand jury investigation").

The delay by the USAO was not for the purpose of reviewing evidence gathered by the SEC to make an informed decision as to whether the case warranted prosecution. From the beginning, the USAO consistently held the position that a criminal prosecution was likely. Almost a year after the SEC investigation began and two years before the USAO made its presence known, the USAO reiterated its position that the case would most likely warrant criminal prosecution, yet decided not to conduct a parallel criminal investigation. Stringer Ex. 101, Memorandum from Robinson to Judy Kobbervig, *et. al.*, at 1 (April 4, 2001). Moreover, the USAO was actively involved in the SEC investigation: meeting regularly, receiving documents, requesting interviews be conducted in Oregon to establish jurisdiction, advising what information was needed for a successful criminal prosecution, specifically instructing on how best to conduct interviews to gather evidence for false statement cases, intentionally hiding its presence from FLIR's attorneys, and repeatedly planning with the SEC as to when it would be best to surface and conduct an overt criminal investigation.

The strategy to conceal the criminal investigation from defendants was an abuse of the investigative

process. In *Kordel,* the Court found there was no abuse in using the civil discovery process to obtain evidence later used in a criminal proceeding because the case was not one in which the government "failed to advise the defendant in its civil proceeding that it contemplates his criminal prosecution . . . nor with any other special circumstances that might suggest the unconstitutionality or even the impropriety of this criminal prosecution." This case clearly falls within the scenario contemplated by the Supreme Court as a "violation of due process or a departure from proper standards in the administration of justice." *Kordel,* 397 U.S. at 11. In this case, the government did not advise defendants that it anticipated their criminal prosecution. Moreover, the USAO intentionally shielded its intentions behind the guise of a civil prosecution, resorting to subterfuge to maintain the secrecy of its involvement.

Defendants had been identified consistently as "targets" or "subjects," and yet the government failed to alert them to the possibility of criminal exposure beyond presenting the standard form that is given to every individual, whether or not a target, prior to testifying. In light of the active role of the USAO in the SEC investigation, this warning was insufficient. *See, e.g., United States v. Thayer,* 214 F. Supp. 929, 933 (D. Colo. 1963) (noting that "the giving of the warning can not have much significance where the defendant was, so to speak, then within the sights of the Government and did not receive an explanation of the true import of the [ ] inquiry").

In addition, it is a due process violation if government agents make affirmative misrepresentations as to the nature or existence of parallel proceedings or otherwise use trickery or deceit. *United States v. Robson,* 477 F.2d 13, 18 (9th Cir. 1973). Echavarria's response to the direct inquiry by Stringer's attorney as to the existence of a criminal investigation was evasive and misleading, particularly in light of the close association between the USAO and the SEC throughout the investigation and the early identification of Stringer as a criminal target.

A government agency may not develop a criminal investigation under the auspices of a civil investigation. *United States v. Grunewald,* 987 F.2d 531, 534 (8th Cir. 1993). It would be a "flagrant disregard of individuals' rights" to "deliberately deceive, or even lull" someone into incriminating themselves in the civil context when "activities of an obvious criminal nature are under investigation." *Id.* (referencing a civil tax audit versus a criminal tax investigation). Here, defendants were identified as subjects of a criminal investigation. The government's tactic to move forward under the guise of a civil investigation, violated defendants' due process rights. *Robson,* 477 F.2d at 18 (finding that the government can not "affirmatively mislead the taxpayer into believing that the investigation is exclusively civil in nature and will not lead to criminal charges"). The USAO confirmed its commitment to a criminal case, but emphasized to the SEC that it would "need to be spoonfed" the evidence from the civil investigation.

Stringer Ex. 73, E-mail from Garten, USAO to Echavarria, SEC (November 6, 2001).

Assuming, *arguendo,* that these were parallel proceedings, dismissal of the indictment or suppression of voluntary testimony given in a parallel civil proceeding is warranted if the government engaged in deceit, trickery, or intentional misrepresentation. *United States v. Tweel,* 550 F.2d 297, 300 (5th Cir. 1977). Here, the government engaged in deceit and trickery to keep the criminal investigation concealed. The government went so far as to instruct court reporters to refrain from mentioning the U.S. Attorney's involvement and to have Garten avoid being near certain interviews for fear his presence would cause the criminal investigation to surface. Moreover, Echavarria misled Stringer and his attorney into believing he was not a target and evaded the question about the USAO's involvement.

Dismissal of an indictment is warranted if the alleged governmental misconduct is "so grossly shocking and so outrageous as to violate the universal sense of justice." *United States v. Smith,* 924 F.2d 889, 897 (9th Cir. 1991); *United States v. Ramirez,* 710 F.2d 535, 539 (9th Cir. 1983). The conduct involved in this case meets that standard. The USAO spent years hiding behind the civil investigation to obtain evidence, avoid criminal discovery rules, and avoid constitutional protections. In *United States v. Rand,* the court dismissed the indictment, finding that the government had "engaged in an obnoxious form of using parallel proceedings." 308 F.Supp. 1231,

1234 (N.D. Ohio 1970). The government "may not bring a parallel civil proceeding and avail itself of the civil discovery devices to obtain evidence for subsequent criminal prosecution." *United States v. Parrott,* 248 F.Supp. 196, 202 (D.D.C. 1965). The facts in this case are more egregious, as it cannot credibly be claimed that these were parallel proceedings.

Moreover, defendants Fifth Amendment rights were violated. As defendants were unaware of the involvement of the USAO, it is "unrealistic to suppose that defendant[s] [would] be on guard against incriminating [themselves]." *Rand,* 308 F.Supp. at 1237. As such, "it is unfair in the extreme to penalize defendant[s] for failure to invoke [their] privilege against self-incrimination." *Id.*

In view of these findings, to "simply suppress the evidence which the government obtained by the methods explored above would not be sufficient to remedy the violation of defendant[s] constitutional rights." *Id.* at 1238. Accordingly, the indictments are dismissed.

Defendants' statements to the SEC were gathered in violation of defendants' due process and Fifth Amendment rights. *Kordel,* 397 U.S. at 12; *Robson,* 477 F.2d at 18. In the event the Ninth Circuit Court of Appeals determines that dismissal of the indictment is in error, for the foregoing reasons, the statements and the evidence obtained from those statements are suppressed.

Defendant Samper's Motion to Dismiss/Suppress

Samper seeks dismissal of the Indictment for violations of his Fifth Amendment Due Process rights, or, alternatively, suppression of all evidence obtained as a result of the violation. Samper joins in the arguments of Martin and Stringer discussed above, and also raises the claim that the government took unfair advantage of Stoel Rives' conflict of interest while pressing for a criminal prosecution.

Samper, former Chief Financial Officer of FLIR, tendered his resignation in February 2000 in the midst of FLIR's public announcements of accounting errors and fallen earnings. Shortly thereafter, the SEC began investigating FLIR and several employees, including Samper. In March 2000, Lois Rosenbaum (Rosenbaum) of Stoel Rives offered to undertake joint representation of Samper, Stringer, and FLIR. Samper indicated that he had already retained independent counsel, but on May 15, 2000, Samper consented to joint representation. On June 30, 2000, Samper was subpoenaed to testify before the SEC.

In July 2000, Echavarria wrote a letter to Rosenbaum, indicating that she was concerned that Stoel Rives was still representing FLIR and several FLIR employees, including Samper:

> Although it is far too early in the investigation of the SEC staff to identify people who may possess liability, we are troubled by the scope of [Stoel Rives'] representation. We

> urge you to stringently evaluate and assess your conflicts prior to continuing with this method of representation. Further, we hope that the possibility of conflicts has been sufficiently explained to all of your putative clients.

Government's Opposition to Defendant Samper's Motion to Dismiss (Govt.'s Opp. to Def. Samper's Mot. to Dismiss), Ex. 20. Rosenbaum responded that she was aware of her ethical obligations and would act accordingly.

Upon advice of Stoel Rives counsel to fully cooperate with the government to avoid liability, Samper testified before the SEC on October 19, 26, and 27, 2000, and later disclosed all FLIR documents in his possession. A second round of interviews was conducted in October and November 2001. At the hearings, Samper was provided the standard SEC Form 1662, which outlined the rights of witnesses and the "routine uses" that the SEC makes of information provided.

The SEC also interviewed several other FLIR employees, many of whom were represented by Stoel Rives and provided either directly incriminating testimony against Samper or provided testimony contrary to Samper's.

On March 8, 2002, FLIR submitted a Wells Submission and stated that civil enforcement proceedings were unnecessary because FLIR had terminated Samper, one of the key employees who had

brought FLIR into the financial quandary: "FLIR does not contest that significant accounting errors were made in the 1998 and 1999 fiscal years. However, the problems that existed in those years are the problem of a company that no longer exists. . . . The individuals who were responsible for the accounting errors have been terminated, and the Company is under new executive and financial management." Defendant Samper's Memorandum in Support of Motion to Dismiss (Def. Samper's Mem. in Supp. of Mot. to Dismiss), Ex. 36, at 1, 6. Shortly thereafter, FLIR entered into a settlement agreement with the SEC wherein they agreed to not violate securities laws in the future. The SEC filed its Complaint against Samper in September 2002.

Samper claims that during the course of negotiating a settlement with the SEC, he asked Echavarria whether a criminal prosecution would follow. Samper asserts that Echavarria misled Samper and deliberately concealed from him the fact that the USAO had already accepted SEC's referral of a criminal prosecution and was actively involved in the investigation.

In January 2003, the prosecutor met with Rosenbaum, wherein she assured the prosecutor that FLIR intended to cooperate in the criminal investigation. *Id.*, Ex. 41. On March 5, 2003, Ms. Rosenbaum sent Samper a letter stating that the Department of Justice had informed her that it was investigating Samper and other FLIR employees. *Id.*, Ex. 42. She indicated that Stoel Rives would continue to act as FLIR's counsel, with Samper's permission, but would

no longer represent individuals, including Samper. *Id.* On April 11, 2003, Samper agreed to have Stoel Rives continue as FLIR's counsel, with the proviso that Stoel Rives would not disclose Samper's "secrets and confidences [or] affirmatively assist the DOJ in developing its case." Def. Samper's Mem. in Supp. of Mot. to Dismiss, Ex. 43. Samper argues that Stoel Rives, through Ms. Rosenbaum, continued to represent FLIR and several FLIR employees who continued to provide useful information to the SEC and the prosecutor in the corresponding civil and criminal proceedings. Def. Samper's Mem. in Supp. of Mot. to Dismiss, Ex. 44.

Samper argues that, as a result, the SEC and the prosecutor continued to exploit what they knew to be a blatant conflict of interest in having Samper's former attorney assist the prosecution in building its criminal case against him. Specifically, Samper argues that the government interfered with Samper's relationship with Rosenbaum by: exploiting Stoel Rives' conflict of interest in representing both FLIR and Samper; failing to advise Samper of facts that would have revealed the conflict of interest; failing to obtain a court order removing Stoel Rives as Samper's counsel; misleading Samper as to whether a criminal investigation had been initiated; using Stoel Rives to gather incriminating evidence against Samper; and depriving Samper of zealous representation and conflict-free advice.

Government interference with a defendant's relationship with his attorney may render the

counsel's assistance so ineffective as to violate the defendant's Fifth Amendment right to due process of law. *United States v. Irwin,* 612 F.2d 1182, 1185 (9th Cir. 1980). However, not all government action that could arguably be called an interference is unlawful. *Id.* "[T]he right is only violated when the intrusion substantially prejudices the defendant," such as using evidence gained through the interference against the defendant at trial, using confidential information pertaining to the defense plans and strategy, causing the defendant to lose confidence in his or her attorney, and other actions intended to give the prosecution an unfair advantage at trial. *Id.* at 1187 (referencing the Sixth Amendment right to counsel, which differs from the Fifth Amendment in that it is triggered once an indictment is issued). When an apparent conflict of interest between the defendant and defense counsel comes to the attention of the government, the government is under an obligation to bring the issue to the trial court's attention and, if necessary, move for disqualification of counsel. *United States v. Tatum,* 943 F.2d 370, 379-80 (4th Cir. 1991).

As discussed above, the SEC was aware that a criminal prosecution would most likely occur, and was actively involved in obtaining evidence for the purposes of criminal prosecution. The government was the only party involved who knew the degree of the conflict of interest in having Rosenbaum represent Samper, FLIR and the other witnesses. Rosenbaum and Samper were not aware of the involvement of the USAO and the intended criminal prosecution. Under

these circumstances, the government should have moved for disqualification of counsel. *Id.*; *Securities Exchange Comm'n v. Higashi,* 359 F.2d 550, 553 (9th Cir. 1966) (noting that multiple representation is allowed only when there is no conflict of interest); *Kentucky West Virginia Gas Co. v. Pennsylvania P.U.C.* 837 F.2d 600, 618 (3rd Cir. 1988) (discussing *Higashi* and finding that ordering parties to retain separate counsel when there is a conflict of interest does not violate due process or the Administrative Procedures Act).

In this case, the government took advantage of counsel's conflict of interest and obtained information it might not have otherwise received. After the SEC filed its Complaint, Rosenbaum telephoned the SEC and expressed surprise that the Swedish drop shipment was not identified as a fraudulent transaction. Samper had described the transaction to Rosenbaum, and Rosenbaum, in turn, identified the transaction and provided the supporting documents to the SEC. This charge was then included in the Indictment. Rosenbaum's desire to cooperate with the government on behalf of FLIR resulted in additional charges against her other client, Samper. The evidence relating to the Swedish drop shipment was improperly obtained by the government. *Irwin,* 612 F.2d at 1187.

For the reasons discussed above in the Stringer and Martin motions, the egregious behavior of the government warrants dismissal of the indictment against Samper. In the event the Ninth Circuit Court of Appeals finds dismissal of the indictment to be in

error, suppression of the SEC statements and the evidence obtained from those statements is warranted. Additionally, in light of the particularized harm to Samper by the government's improper behavior regarding Rosenbaum's conflict of interest, the evidence relating to the Swedish drop shipment and anything derived from that evidence is also suppressed. Charges related to the Swedish drop shipment are also stricken from the Indictment.

CONCLUSION

Defendant Stringer's Motion to Dismiss the Indictment (Doc. #182-1) is GRANTED. Defendant Stringer's Motion to Suppress SEC Interview Statements (Doc. #182-2) is GRANTED. Defendant Stringer's SEC interview statements and any evidence derived from those statements are suppressed. Defendant Martin's Motion to Dismiss the Indictment (Doc. #166-1) is GRANTED. Defendant Martin's Motion to Suppress Statements and Documents (Doc #166-2) is GRANTED. Defendant Martin's SEC interview statements and any evidence derived from those statements are suppressed. Defendant Samper's Motion to Dismiss the Indictment for Violation of Due Process (Doc. #188-1) is GRANTED. Defendant Samper's Motion to Suppress Evidence (Doc. #188-2) is GRANTED. Defendant Samper's SEC interview statements and any evidence derived from those statements are suppressed. Additionally, the evidence related to the Swedish drop shipment is

suppressed and any reference to the Swedish drop shipment in the Indictment is hereby STRICKEN.

IT IS SO ORDERED.

Dated this 9 day of January, 2006.

/s/ Ancer L. Haggerty
Ancer L. Haggerty
United States District Judge